Supreme Court, U.S.
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No. 06-

IN THE

Supreme Court of the United States

CORUS STAAL BV,
Petitioner,

v.

UNITED STATES OF AMERICA
AND UNITED STATES STEEL CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a court reviewing an agency determination that implicates the international obligations of the United States under the World Trade Organization Agreements must remand that determination to the agency because the agency has announced an intervening change in policy affecting that determination.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner is Corus Staal BV, a Dutch manufacturer of steel and other products. Corus Staal BV is 100% owned by Corus Investment BV, which is 100% owned by Koninklijke Hoogovens NV (now Corus Nederland BV), which is 100% owned (through its ownership interest in Corus CNBV Investments BV (19%) and Corus Property Ltd. (81%)) by Corus Group plc, a publicly owned company whose shares are listed on the New York, London, and Amsterdam stock exchanges.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Corus Staal BV ("Corus"), respectfully prays that this Honorable Court issue a writ of certiorari to the U.S. Court of Appeals for the Federal Circuit.

OPINIONS AND ORDERS BELOW

The judgment of the Court of Appeals was entered without opinion on June 13, 2006 and is reported at 186 Fed. Appx. 997. App. 2a. The order of the court of appeals denying the petition for rehearing and rehearing *en banc* is unreported. App. 1a.

The opinion of the U.S. Court of International Trade is reported at 387 F. Supp. 2d 1291. App. 3a.

The final determination of the U.S. Department of Commerce is reported at 69 Fed. Reg. 33,630 (June 16, 2004) (App. 35a), *as amended* 69 Fed. Reg. 43,801 (July 22, 2004) (App. 28a).

JURISDICTION

The judgment of the court of appeals was entered on June 13, 2006. App. 2a. On September 12, 2006, the court of appeals entered an order denying Corus' timely petition for a rehearing and rehearing *en banc*. App. 1a. On November 30, 2006, the Chief Justice granted Corus' application for an extension of time within which to file a petition for a writ of certiorari to and including January 25, 2007. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Tariff Act of 1930, as amended, provides in relevant part: "If the determinations of the administering authority and the Commission under subsections (a)(1) and (b)(1) of this section are affirmative, then the administering authority shall issue an antidumping duty order under section 1673e(a) of this title. If either of such determinations is negative, the investigation shall be terminated upon the publication of notice of that negative determination and the administering authority shall-- (A) terminate the suspension of liquidation under section 1673b(d)(2) of this title, and (B) release any bond or other security, and refund any cash deposit, required under section 1673b(d)(1)(B) of this title. 19 U.S.C. § 1673d(c)(2).

The relevant provisions of the Uruguay Round Agreements Act, 19 U.S.C. §§ 3533 and 3538, are reproduced at App., *infra*, 45a.

STATEMENT

This case presents an important question of administrative law with significant implications for the United States'

international obligations under the World Trade Organization ("WTO") Agreements. Under established precedent of this Court, a reviewing court must remand an agency determination when an agency announces an intervening change of policy. *NLRB v. Food Store Employees Union*, 417 U.S. 1, 10 & n.10 (1974). This remand is necessary so that the agency can determine, in the first instance, whether the change in policy applies to the agency determination under judicial review.

The U.S. Court of Appeals for the Federal Circuit ignored this rule.[1] Instead, despite an intervening change in policy announced by the U.S. Department of Commerce ("Commerce") on an issue likely dispositive of the pending appeal, the Federal Circuit decided without opinion that a remand of an antidumping decision was not warranted. This refusal to remand has limited the implementation of this change in policy by effectively precluding the change in policy from affecting the Commerce decision under review.

The consequences of the Federal Circuit's refusal to remand are serious and require this Court to grant this petition. First, Commerce announced the change in policy in order to bring the United States into conformity with its international obligations under the WTO Agreements. The Federal Circuit's failure to remand limits Commerce's ability to implement the change in policy and thereby contradicts the congressionally-mandated implementation process for adverse WTO reports, which places the responsibility for implementation of such reports with the Executive Branch in consultation with Congress. In addition, because the antidumping proceeding undergoing Federal Circuit review and the announced change in policy directly implicate the United States' international obligations under the WTO Agreements,

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[1] The appeal to the Federal Circuit followed review by the Court of International Trade pursuant to 19 U.S.C. § 1516a and 28 U.S.C. § 1581(c).

the Federal Circuit's failure to remand violates constitutional separation of powers considerations, which recognize the sole competency of the Executive Branch in conducting the foreign affairs of the United States. Finally, the issue presented here is likely to arise in various agency proceedings, in future WTO disputes, and in at least one case pending before the Federal Circuit.

A. Background on Antidumping Proceedings

The Petitioner, Corus, is a Dutch steel producer. Certain of Corus' exports of steel to the United States have been subject to antidumping duties for more than five years pursuant to an antidumping determination that the WTO recently ruled violated the United States' international trade obligations.

"Dumping" refers to the sale of foreign goods at less than fair value. Generally, dumping is determined by comparing the price of the imported good in the United States to the price of the good in the home market. The lower the U.S. price is in relation to the home market price, the greater the dumping margin.[2] Under U.S. law, foreign producers or exporters who sell dumped products in the United States may be subject to antidumping duties. The agency responsible for determining whether dumping is occurring, as well as establishing the level of antidumping duties to apply to imports, is Commerce. 19 U.S.C. §§ 1673(1) & 1675(a)(2)(C). In addition to a dumping determination, U.S. law requires a finding that imports cause injury (or threaten to cause injury) to a U.S. industry before antidumping duties may be imposed. 19 U.S.C. § 1673(2). The agency responsible for making injury determinations is the U.S. International Trade Commission ("the Commission"). 19 U.S.C. § 1673(2).

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[2] *See* 19 U.S.C. § 1677(35) (defining a dumping margin as a comparison between "normal value" (home market price) and export price or constructed export price (U.S. price)).

Commerce administers the antidumping law through antidumping "proceedings." 19 C.F.R. § 351.102. These proceedings are divided into several "segments." *Id.* The first segment is an antidumping investigation where Commerce determines if dumping is occurring. If Commerce makes an affirmative dumping determination and the Commission makes an affirmative injury determination, Commerce issues an antidumping order on the dumped product. 19 U.S.C. § 1673d(c)(1). If Commerce makes a negative dumping determination, *e.g.*, determines that goods have been sold at fair value, or the Commission makes a negative injury determination, then no dumping order issues and the antidumping proceeding is terminated. 19 U.S.C. § 1673d(c)(2).

U.S. law further provides that, in a separate segment of the antidumping proceeding, through "administrative reviews," antidumping orders may be reviewed on an annual basis. 19 U.S.C. § 1675(a)(1). During the review process, Commerce examines the sales from the "period of review" (*e.g.*, the prior twelve months) to determine the level of dumping for that period. The final rate of antidumping duties for goods that entered the United States during the period of review is based on the results of the administrative review. 19 U.S.C. § 1675(a)(2)(C). If Commerce does not find dumping during the review, the final rate is zero and no antidumping duties are collected.

Antidumping duties are assessed on dumped imports through a cash deposit system. As imports subject to an antidumping order enter the United States, the importer posts cash deposits based on the level of dumping established in the most recently completed administrative review in the antidumping proceeding. 19 U.S.C. § 1673g(a). These cash deposits are held by U.S. Customs and Border Protection ("Customs") until Commerce completes the administrative review for the period of review in which the imports entered the United States. Once the administrative review is com-

pleted, the duties are "liquidated," or finally assessed, based on the results of the administrative review. 19 U.S.C. § 1675(a)(2)(C). If the liquidated duties are greater than the cash deposits, additional duties plus interest are assessed on the importer. 19 U.S.C. § 1673f(b). If the liquidated duties are less than the cash deposits, duties are refunded to the importer with interest. *Id.* Liquidation is largely a final act that cannot be reversed. 19 U.S.C. § 1514(a)&(b). Thus, the U.S. Court of International Trade routinely grants preliminary injunctions in order to prevent liquidation during the pendency of litigation arising from the antidumping proceeding. Once the litigation is concluded and the preliminary injunction is lifted, liquidation occurs based on the results of the litigation.

B. Commerce's Intervening Change in Policy

This case arises out of the first administrative review[3] within the antidumping proceeding on hot rolled steel from the Netherlands ("Dutch Steel Antidumping Proceeding"). Corus challenged the first administrative review results before the Court of International Trade (App. 3a) and the Federal Circuit (App. 2a), arguing that application of antidumping duties to its steel products was contrary to U.S. law. Both courts rejected Corus' arguments and affirmed Commerce's results. *Id.*

After briefing, but before the Federal Circuit entered judgment without opinion, Commerce announced an important change in policy for antidumping proceedings. Commerce announced that it was abandoning its long-standing

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[3] *Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands*, 69 Fed. Reg. 33,630 (Dep't of Commerce June 16, 2004) (final admin. rev.) (App. 35a), *as amended by* 69 Fed. Reg. 43,801 (Dep't of Commerce July 22, 2004) (am. final admin. rev.) (App. 28a).

policy of "zeroing" in antidumping investigations.[4] Moreover, as described below, Commerce also agreed to implement this change in policy in the Dutch Steel Antidumping Proceeding.

Under the zeroing policy, Commerce does not give full effect to sales made at fair value. Rather, the difference between normal value and the U.S. price is set to zero when the U.S. price is at or above fair value. Commerce employed this policy in the vast majority of antidumping investigations, including the Dutch Steel Antidumping Investigation. It is uncontested that, if Commerce had not employed zeroing, Commerce would have made a negative dumping determination in the Dutch Steel Antidumping Proceeding.[5] That is, Commerce was able to make an affirmative dumping determination in the Dutch Steel Antidumping Proceeding only because it did not give full effect to Corus' sales made at or above fair value. Without an affirmative dumping determination, Commerce has no legal authority to impose an antidumping order or conduct administrative reviews and

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[4] *Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation*, 71 Fed. Reg. 11,189 (Dep't of Commerce Mar. 6, 2006). App. 109a.

[5] *See* Request for the Establishment of a Panel by the European Communities, *United States-Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/7/Rev.1 (Feb. 19, 2004) ("Zeroing Panel Request"). App. 75a. In this request, the European Communities identified those antidumping proceedings for which Commerce would not have calculated a dumping margin (*i.e.*, Commerce would have "calculated a negative margin") but for zeroing. Included among the identified proceedings is the Dutch Steel Antidumping Proceeding. Zeroing Panel Request, WT/DS294/7/Rev.1, at 7 ("Specific Case No. 1"). App. 84a. The United States has not disputed that, without zeroing, the Dutch Steel Antidumping Investigation determination would have been negative. *See, e.g., Corus Staal BV v. U.S. Dep't of Commerce*, 259 F. Supp. 2d 1253, 1260 & n.8 (Ct. Int'l Trade 2003).

Commerce must terminate the antidumping proceeding. 19 U.S.C. § 1673d(c)(2). Thus, as a result of the change in zeroing policy, the legal basis for the Dutch Steel Antidumping Proceeding—including the administrative review upon which this petition is based—now must be reexamined by Commerce.

Commerce announced the abandonment of zeroing[6] in response to a challenge to zeroing brought against the United States under the WTO Agreements ("*U.S.-Zeroing*").[7] This WTO dispute included both a facial challenge (referred to in WTO litigation as an "as such" challenge) and as applied challenges to zeroing in fifteen antidumping investigations and sixteen administrative reviews. Included among the as applied challenges was the Dutch Steel Antidumping Investigation. App. 84a. As a result of the dispute, the WTO's highest decisional body, the WTO Appellate Body, ruled zeroing to be a violation of the United States' obligations under the WTO Agreements both on an as such basis in antidumping investigations and as applied in the

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[6] Specifically, Commerce announced that it would no longer utilize zeroing in average-to-average price comparisons conducted during antidumping investigations. *Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation*, 71 Fed. Reg. at 11,189. App. 109a. U.S. law provides Commerce with additional comparison methodologies (*e.g.*, transaction-to-transaction comparisons). 19 U.S.C. § 1677f-1(d). These other comparison methodologies are not relevant to the instant case because they are only used in unusual circumstances which Commerce has not found in the Dutch Steel Antidumping Proceeding. *See* 19 C.F.R. § 351.414(c). Additionally, to the extent that Commerce would consider employing an alternative comparison methodology in implementing *U.S.-Zeroing*, Commerce could not zero because the WTO Appellate Body has ruled zeroing under alternative comparison methodologies to be a facial (or "as such") violation of the WTO Agreements. Appellate Body Report, *United States-Measures Relating to Zeroing and Sunset Reviews*, ¶ 190, WT/DS322/ AB/R (Jan. 9, 2007).

[7] Zeroing Panel Request, WT/DS294/7/Rev.1. App. 75a.

challenged antidumping investigations and administrative reviews.[8] On May 30, 2006, the United States formally announced to the WTO that it would implement fully the *U.S.-Zeroing* WTO Report. App. 105a.

C. Implementation Considerations Resulting from the Change in Policy

Changes in policy made in order to implement WTO reports are governed by Section 123 of the Uruguay Round Agreements Act.[9] Commerce announced its abandonment of zeroing under this statutory provision.[10] Redeterminations of Commerce antidumping decisions in response to as applied WTO challenges are governed, in part, by Section 129 of the Uruguay Round Agreements Act. 19 U.S.C. § 3538. App. 49a. In implementing *U.S.-Zeroing*, Commerce will have to make Section 129 determinations for each of the challenged antidumping investigations and administrative reviews, including the Dutch Steel Antidumping Investigation.

Section 129 determinations apply to goods that enter the United States on or after the date on which the U.S. Trade Representative ("USTR") directs Commerce to implement the Section 129 determination. 19 U.S.C. § 3538(c). App. 52a. No provision of U.S. law speaks directly to how the United States should implement WTO decisions as to goods that

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[8] Appellate Body Report, *United States-Laws, Regulations, and Methodology for Calculating Dumping Margins ("Zeroing")*, ¶ 263, WT/DS294/AB/R (Apr. 18, 2006).

[9] 19 U.S.C. § 3533(g). App. 47a. The Uruguay Round Agreements Act gives legal effect to the WTO Agreements under U.S. law.

[10] App. 109a. Commerce recently published in the *Federal Register* a final notice under Section 123 of the Uruguay Round Agreements Act confirming that it has abandoned its zeroing policy. *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation*, 71 Fed. Reg. 77,722 (Dep't of Commerce Dec. 27, 2006) (final modification). App. 114a.

enter the United States prior to USTR authorization. Thus, in implementing a WTO report, one important issue that Commerce must decide is how such an implementation will affect goods that have previously entered the United States but remain unliquidated. This is particularly the case when the new WTO-consistent policy will result in the revocation of an antidumping order. In such an instance, Commerce would have to determine how revocation of the order would apply to previously entered but unliquidated entries. In a WTO challenge that analyzed the Section 129 implementation process, the United States expressly recognized the need for Commerce to undertake such an analysis:

> The second scenario . . . is a situation where the WTO challenge results in the revocation of antidumping or countervailing duty order because the new, WTO-consistent determination results in a finding of no injury, no dumping, or no subsidization. Under the terms of section 129(c)(1), the revocation would apply to all entries which took place on or after the date of revocation of the order, so Commerce would instruct the U.S. Customs Service to stop requiring cash deposits as of that date. In any subsequent administrative review, Commerce *would need to decide* what to do with respect to entries that took place prior to the date of revocation.[11]

In agreeing to implement the *U.S.-Zeroing* WTO Report, the United States has agreed, *inter alia*, to abandon its zeroing policy in all future antidumping investigations and apply that abandonment in the challenged antidumping investigations, including the investigation on which the Dutch Steel Antidumping Proceeding is premised. As described above, one of the important decisions Commerce will have to make in implementing *U.S.-Zeroing* in the Dutch Steel Antidumping

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[11] Second Written Submission of the United States, *United States-Section 129(c)(1) of the Uruguay Round Agreements Act*, ¶ 19, WT/DS221 (Mar. 8, 2002) (emphasis added). App. 139a-140a.

Proceeding is how that implementation will affect previously entered but unliquidated entries covered by the Dutch Steel Antidumping Order,[12] including those entries covered by the administrative review underlying this certiorari petition. Furthermore, it is uncontested that Commerce made an affirmative dumping determination in the Dutch Steel Antidumping Investigation only as a result of its zeroing policy. *See* discussion *supra* pp. 7-8 & n.5. Thus, in making its Section 129 determination, Commerce will have to revoke the Dutch Steel Antidumping Order and terminate the antidumping proceeding. Consistent with the United States' representations to the WTO in the Section 129 dispute quoted above, this revocation will require Commerce to determine "what to do with respect to entries that took place prior to the date of revocation" of the Dutch Steel Antidumping Order. *See* quotation *supra* p. 10. Included within this decision will be what to do with entries covered by the administrative review upon which this certiorari petition is based.

REASONS FOR GRANTING THE PETITION

The Federal Circuit's refusal to remand the first administrative review of the Dutch Steel Antidumping Proceeding violates clear precedent of this Court, which requires a reviewing court to remand following an intervening change in policy in order that the agency may determine, in the first instance, whether the change in policy will apply to the administrative decision undergoing judicial review. *NLRB v. Food Store Employees Union, Local 347*, 417 U.S. 1, 10 & n.10 (1974). This precedent has been followed by the U.S. Court of Appeals for the D.C. Circuit on numerous occasions.

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[12] *Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands*, 66 Fed. Reg. 59,565 (Dep't of Commerce Nov. 29, 2001) (antidumping order) ("Dutch Steel Antidumping Order").

In addition, as a result of the Federal Circuit's refusal to remand, Commerce's ability to implement the change in zeroing policy has been limited because the Federal Circuit effectively precluded the change in policy from affecting the first administrative review of the Dutch Steel Antidumping Order.

The violation of this Court's precedent and resulting limitation on the implementation of the change in zeroing policy is serious and it is important for this Court to grant this petition for several reasons. First, the Federal Circuit's failure to remand violates the congressionally-mandated implementation process for adverse WTO reports which recognizes the Executive Branch in consultation with Congress as being responsible for implementation of adverse WTO reports. Second, the Federal Circuit's failure to remand violates constitutional separation of powers considerations that recognize the sole competency of the Executive Branch to conduct the foreign affairs of the United States. Finally, the issue raised here is likely to occur in various agency proceedings, in future WTO disputes, and in at least one pending case.

Furthermore, the Federal Circuit's exclusive appellate jurisdiction over international trade disputes, 28 U.S.C. § 1295(a)(5), ensures that the issues raised in this case will not be further vetted in the other federal judicial circuits. Accordingly, this Court is the only forum available to correct the fundamental departure from this Court's precedent embodied in the Federal Circuit's order.

I. THE FAILURE TO REMAND BELOW VIOLATES IN PRINCIPLE A DECISION OF THIS COURT AND CONFLICTS IN PRINCIPLE WITH THE DECISIONS OF THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

A. This Court Has Established the Principle that a Court Reviewing an Agency Determination Following an Intervening Change of Policy Must Remand to the Agency

In *Food Store Employees Union*, this Court reversed a court of appeals decision that amended an NLRB order to include an award of litigation expenses. 417 U.S. at 11. Prior to *Food Store Employees Union*, the NLRB had a policy of excluding these expenses from its orders. However, during the pendency of the litigation, the NLRB issued an opinion changing the policy to favor inclusion. Because of this intervening change in policy, the court of appeals ordered these expenses included in the order. This Court reversed the court of appeals, finding that:

> a court reviewing an agency decision following an intervening change of policy by the agency should remand to permit the agency to decide in the first instance whether giving the change retrospective effect will best effectuate the policies underlying the agency's governing act.

417 U.S. at 10 n.10; *accord* 2 *Federal Procedure—Lawyers Edition* § 2:394 (2003) ("[c]hange in agency rule").

B. Consistent with this Court's Precedent, the Court of Appeals for the District of Columbia Circuit Has Repeatedly Held that a Court Reviewing an Agency Determination Following an Intervening Change of Policy Must Remand to the Agency

The U.S. Court of Appeals for the District of Columbia Circuit has repeatedly followed the principle enunciated in *Food Store Employees Union.* For example, in *Williston Basin Interstate Pipeline Company v. FERC* ("*Williston Basin*"), the D.C. Circuit remanded a determination to the Federal Energy Regulatory Commission ("FERC") because the agency announced a change in policy. 165 F.3d 54, 62-63 (D.C. Cir. 1999). During the pendency of the *Williston Basin* litigation, the FERC issued a determination in which it changed its policy for evaluating the rate of return on common equity to weigh short-term data more heavily. *Id.* at 61-62. The D.C. Circuit held that the case had to be remanded to the FERC in order for the agency to determine whether the appellant's rate of return on common equity should be recalculated consistent with the new policy. *Id.* at 62-63.

Similarly, in *Panhandle Eastern Pipe Line Co. v. FERC*, the D.C. Circuit remanded a FERC determination due to an intervening change in policy. 890 F.2d 435, 439 (D.C. Cir. 1989). In that determination, the FERC denied certain proposed tariff sheets that required customer orders for the transportation of natural gas to be carried out through a second pipeline company. In order to transfer those orders to the second pipeline company, the tariff sheet filer proposed assigning to its customers its entitlement to transportation services provided by the second pipeline company. The FERC rejected the proposed tariff sheets, ruling, *inter alia*, that assigning entitlements to transportation services (*i.e.*, "capacity brokering") was not allowed under established FERC policy. *Id.* at 438. The D.C. Circuit remanded the

FERC determination because, following the issuance of the determination, the FERC announced a change in policy that allowed for capacity brokering in individual cases and, at times, even encouraged such brokering. In explaining the basis for the remand, the D.C. Circuit cited this Court's decision in *Food Store Employees Union* and explained that a remand was appropriate following an intervening change in policy because:

> [s]uch a disposition represents the intersection of two well-established doctrines. The first holds that an appellate court must consider the law in effect at the time it renders its decision, even when a change in governing law is made by an administrative agency. *See Thorpe v. Housing Auth.*, 393 U.S. 268, 281 . . . (1969). The second holds that a reviewing court may 'not supply a reasoned basis for the agency's action that the agency itself has not given.' *Motor Vehicles Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 . . . (1983). Thus, because we are at liberty neither to evaluate the [FERC]'s decision under [its] *old* policy on capacity brokering nor to assess on our own how Panhandle's tariffs would fare under FERC's *new* policy, we are required to remand so that the [FERC] may indicate how, if at all, its decision would be affected by its intervening policy change.[10]
>
> [10]The [FERC] will need to determine, for example, 'whether giving the change retrospective effect will best effectuate the policies underlying' the pertinent regulations, *Food Store Employees Union*, 417 U.S. at 10 n.10 . . . and if so, how [its] new policy applies to Panhandle's tariffs.

Id. at 438-39 & n.10 (footnote omitted).

C. The Failure To Remand Below Is in Direct Conflict with the Remand Principle Established by this Court and Followed by the District of Columbia Circuit

Both Commerce and USTR have stated in unequivocal terms that Commerce will no longer employ in antidumping investigations an average-to-average price comparison with zeroing. *See* discussion *supra* pp. 9-10. This change in policy occurred during the pendency of the Federal Circuit litigation (*i.e.*, after briefing, before the Federal Circuit issued its judgment without opinion affirming the Court of International Trade decision and before Corus' motion for reconsideration). It is undisputed that Commerce employed this abandoned zeroing methodology in the Dutch Steel Antidumping Proceeding, the first administrative review of which the Federal Circuit was examining below. It also is undisputed that a non-zeroed computation in the investigation of Corus' sales would have resulted in a determination that Corus was *not* dumping, thus precluding Commerce from issuing the antidumping order upon which the appealed administrative review relies for authority. Finally, the United States has given a commitment to the WTO Dispute Settlement Body that it will implement the zeroing WTO Report in the Dutch Steel Antidumping Proceeding. This WTO Report requires the United States to refrain from zeroing when re-determining dumping in the Dutch Steel Antidumping Proceeding. Thus, as Corus argued in its petition for rehearing (App. 54a), it was incumbent upon the Federal Circuit to remand this case to Commerce under the principle enunciated in *Food Store Employees Union.*

The Federal Circuit's refusal to remand is in direct conflict with the *Food Store Employees Union* remand rule. This Court explained that a remand following an intervening change in policy is necessary to allow the agency to determine in the first instance the extent to which the change in

policy should be given retrospective effect. *Food Store Employees Union*, 417 U.S. at 10 & n.10; *see also Panhandle Eastern Pipe Line Co.*, 890 F.2d at 439 & n.10; *Williston Basin*, 165 F.3d at 63. The "retrospective effect" to which this Court referred was whether the NLRB's change in policy should apply to an agency determination completed before the change in policy and undergoing judicial review. In the instant case, the Government must answer a similar question. The Government must determine how its change in zeroing policy should affect the legal basis for an administrative review determination that is undergoing judicial review.

As a result of the *U.S.-Zeroing* WTO dispute, the United States has agreed to implement a new comparison methodology for all future antidumping investigations as well as in the fifteen challenged antidumping investigations, including the investigation of Corus' imports. It is uncontested that, but for the abandoned zeroing methodology, Commerce would have made a negative dumping determination in the Dutch Steel Antidumping Investigation. *See* discussion *supra* pp. 7-8 & n.5. Thus, in the Dutch Steel Antidumping Proceeding, Commerce was able to make an affirmative dumping determination and impose an antidumping order—the same order under which Commerce conducted the appealed administrative review—only by using the methodology that is the subject of the policy change.

This case therefore presents even more conclusive facts than did *Food Store Employees Union* or the D.C. Circuit cases cited above for the principle that a court, faced with an intervening change in policy by the agency, must remand to permit the agency to decide in the first instance issues related to the application of the changed policy to cases undergoing judicial review. Here, the agency has announced the abandonment of the zeroing methodology without which it would have been unable to issue the antidumping order that provided the legal authority for the appealed review. App.

109a. The abandonment of the methodology was unequivocally reconfirmed nine months later. App. 114a. Moreover, the United States has resolved the issue of whether that methodological change will apply to the investigation that justified the antidumping order in this case. It did so by committing to the WTO to implement *in the instant antidumping proceeding* the abandonment of the zeroing methodology condemned in *U.S.-Zeroing*.[13]

There remain, of course, issues that the agency must address. With the computation method that supported issuance of the order now abandoned, is there any other basis on which the validity of the order can be maintained? If the order was invalidly issued, does this remove the basis on which the reviews of that order—such as the review on appeal—can be properly conducted? *Jilin Henghe Pharm. Co. v. United States*, 342 F. Supp. 2d 1301, 1309-10 (Ct. Int'l Trade 2004) (once Commerce's dumping determination is invalidated, it cannot serve as a legal basis for imposition of antidumping duties), *vacated as moot*, 123 Fed. Appx. 402 (Fed. Cir. 2005). As to the latter question, the Court should note that the United States has given specific assurance to the WTO that, where an order is revoked in implementation of a WTO report, "Commerce would need to decide what to do with respect to entries that took place prior to the date of revocation."[14] The remand that is required by the rule of *Food Store Employees Union* is therefore to permit the agency to consider fully the implementation issues which

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[13] Commerce recently has confirmed that the change in policy will be applied to this proceeding. *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation*, 71 Fed. Reg. 77,722, 77,725 (Dep't of Commerce Dec. 27, 2006) (final modification). App. 114a.

[14] Second Written Submission of the United States, *United States-Section 129(c)(1) of the Uruguay Round Agreements Act*, ¶ 19, WT/DS221 (Mar. 8, 2002). App. 140a.

arise from the implementation course it has already set—namely, to apply its change in policy to the antidumping proceeding of which the appealed decision was the first administrative review. The issues that remain unresolved—issues relating to the effect of that retrospective application of the changed policy to the validity of the antidumping proceeding, including the validity of the appealed review—are quintessentially the type of issues that both this Court and the D.C. Circuit have held must be decided by the agency and that require a remand.

Thus, for all these reasons, the only proper course is for this case to be remanded so that the Executive Branch may determine in the first instance the extent to which the zeroing change in policy should affect cases under on-going judicial review, including the case underlying the instant certiorari petition.

II. THE FAILURE TO REMAND IS OF GREAT IMPORTANCE BECAUSE IT DIRECTLY IMPLICATES THE UNITED STATES' INTERNATIONAL OBLIGATIONS UNDER THE WTO AGREEMENTS

As discussed above, the United States has obligated itself to implement the *U.S.-Zeroing* WTO decision in the Dutch Steel Antidumping Proceeding which underlies the instant certiorari petition. *See* discussion *supra* pp. 10-11. Where a court is reviewing an administrative proceeding in which the United States has obligated itself internationally, it is particularly important for the reviewing court to remand to the agency. First, such a remand is consistent with the congressionally-mandated implementation regime for adverse WTO reports. This statutory regime places the responsibility for implementation squarely in the Executive Branch (*i.e.*, USTR and Commerce). 19 U.S.C. §§ 3533(g) & 3538. Apps. 47a & 49a. Second, such a remand comports with the

constitutional separation of powers which recognizes the sole competency of the Executive Branch in conducting the foreign affairs of the United States. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936). A remand would allow the Executive Branch to evaluate fully the implementation as it relates to the United States' international obligations, thus minimizing the likelihood that the United States will act contrary to these obligations. In this way, such a remand also is consistent with the responsibility of the Federal Judiciary in minimizing conflicts between the law of the United States and the United States' international obligations. *Cf. Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains").

Finally, such a remand also comports with general principles of administrative law which recognize the importance of allowing agencies primary jurisdiction to determine how to conduct agency proceedings. As this Court has recognized, allowing agencies the discretion to consider, in the first instance, how to conduct an agency proceeding is necessary given that "practical considerations dictate a division of functions between court and agency. . . ." *Federal Maritime Bd. v. Isbrandtsen Co.*, 356 U.S. 481, 498 (1958). Allowing agencies primary jurisdiction facilitates the conduct of the agencies' congressionally-mandated responsibility in maintaining uniform regulatory schemes and also permits the government to take full advantage of the specialized knowledge of these agencies with respect to matters within their fields. Alfred C. Aman, Jr. & William T. Mayton, *Administrative Law* § 12.11 (2d ed. 2001).

The Federal Circuit has expressly recognized the importance of allowing the Executive Branch to take the primary

role in implementing adverse WTO reports without interference from the Judiciary. The Federal Circuit has stated:

> Congress . . . has authorized the United States Trade Representative, an arm of the Executive branch, in consultation with various congressional and executive bodies and agencies, to determine whether or not to implement the [WTO] reports and determinations and, if so implemented, the extent of implementation.
>
> * * * *
>
> * * * We will not attempt to perform duties that fall within the exclusive province of the political branches . . . .

Corus Staal BV v. Dep't of Commerce, 395 F.3d 1343, 1349 (Fed. Cir. 2005), *cert. denied*, 126 S. Ct. 1023 (2006). In failing to remand in the case below, the Federal Circuit violated these principles, effectively deciding that implementation of *U.S.-Zeroing* would not reach the goods covered by the first administrative review of the Dutch Steel Antidumping Order. Specifically, a remand is necessary in order for the Government to include the first administrative review of the Dutch Steel Antidumping Order in the implementation of *U.S.-Zeroing*. For the reasons discussed above, such a limitation on the Executive Branch's implementation of the United States' international obligations is impermissible under the Uruguay Round Agreements Act, constitutional separation of powers principles, and general administrative law principles, and must be corrected by this Court.

Given the direct impact on the United States' international obligations under the WTO Agreements, the importance of remanding in the instant proceeding is manifest. However, there are implementation issues specific to this case which make granting the petition for certiorari even more crucial. Specifically, it is uncontested that implementation of *U.S.-Zeroing* will result in a negative dumping determination, thus invalidating the Dutch Steel Antidumping Order and requiring termination of the Dutch Steel Antidumping Pro-

ceeding. *See* discussion *supra* pp. 7-8 & n.5. The issues inherent to revoking an antidumping order in response to an adverse WTO report, particularly whether such a revocation will reach previously entered but unliquidated entries, have never been resolved by the Executive Branch.

Moreover, there can be no question that these revocation issues are highly controversial under the WTO Agreements. In 2001, Canada challenged the United States' legal regime for implementation of adverse WTO reports, arguing that it was WTO-inconsistent because, *inter alia*, it would not allow the Executive Branch to reach previously entered but unliquidated entries when revoking an antidumping order. The United States argued before the WTO panel that the implementation regime did not preclude a revocation from affecting previously entered but unliquidated entries and that, instead, the Executive Branch would have to determine in individual cases how the revocation would affect such entries. *See* discussion *supra* p. 10.

Based largely on this argument, the WTO panel ruled that the U.S. implementation regime was WTO-consistent.[15] Thus, there can be no question that the implementation issues inherent in *U.S.-Zeroing* directly implicate controversial issues under the WTO Agreements and necessitate a remand.

Furthermore, when the Federal Circuit's limitation on the United States' implementation is considered in light of the WTO report in the challenge to Section 129, it is evident that the Federal Circuit could be, in effect, causing the United States to violate its international obligations. That is, if the United States is unable to reach previously entered but unliquidated entries in implementing *U.S.-Zeroing*, the United States may be in violation of its international obligations under the WTO Agreements. A remand would enable Com-

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[15] Panel Report, *United States-Section 129(c)(1) of the Uruguay Round Agreements Act*, ¶¶ 6.82 & 6.83, WT/DS221/R (July 15, 2002).

merce to prevent this result because it would ensure that the Executive Branch has available the full range of options when deciding how to implement *U.S.-Zeroing*.

III. THE FAILURE TO REMAND IS OF GREAT IMPORTANCE BECAUSE THE *FOOD STORE EMPLOYEES UNION* ISSUE IS LIKELY TO RECUR IN VARIOUS AGENCY PROCEEDINGS, IN FUTURE WTO DISPUTES, AND IN A PENDING CASE

As explained above, the *Food Store Employees Union* rule requires a remand when an agency announces an intervening change in policy and that policy was applied in an administrative determination undergoing judicial review. *See* discussion *supra* p. 13. The remand is required in order to determine the extent to which the change in policy should affect the administrative determination undergoing judicial review. Because of the structure of the administrative proceeding underlying this certiorari petition, the need to remand herein is particularly acute. The need for a remand will also present itself in future WTO antidumping and countervailing duty disputes. Finally, this issue is likely to arise in various administrative proceedings that the Federal Circuit reviews and in at least one additional case undergoing Federal Circuit review. Because this issue is likely to arise in an ongoing case and future cases before the Federal Circuit, it is particularly important for this Court to grant the instant certiorari petition.

Antidumping proceedings are made of up of a three-step sequential process: agency investigation, issuance of an agency order, and agency action pursuant to the order. *See* discussion *supra* p. 5. Each of these steps is dependent on the completion of the prior step. Once an agency announces a change of policy that is to be applied to a prior step, the agency must decide whether this change in policy will affect

the subsequent steps in the administrative proceeding. Thus, as Commerce has announced a change in policy in the first step in the instant agency proceeding (*i.e.*, the Dutch Steel Antidumping Investigation), Commerce must decide whether this change will affect subsequent steps in the proceeding, including the Dutch Steel Antidumping Order and the administrative reviews under that order.

The need for such a remand is additionally required in the instant case because it is uncontested that the announced change in policy will result in a negative dumping determination, thus invalidating the second step of the agency proceeding (*i.e.*, invalidating the Dutch Steel Antidumping Order) and requiring termination of the Dutch Steel Antidumping Proceeding. *See* discussion *supra* pp. 7-8 & n.5. An agency remand is needed, therefore, in order to determine whether any future agency action (*e.g.*, assessment of antidumping duties) may be taken pursuant to the invalidated Dutch Steel Antidumping Order.

This three-step process is found in all antidumping and countervailing duty proceedings. Thus, the need for a remand is likely to occur in future WTO disputes involving antidumping and countervailing duty proceedings.[16] Whenever, as in the instant appeal, an antidumping or countervailing duty WTO dispute results in a change in policy that is to be

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[16] Countervailing duty proceedings are conducted to determine whether foreign producers exporting goods to the United States have benefited from improper subsidization by a foreign government. Countervailing duty proceedings have the same structure as antidumping proceedings (*e.g.*, investigation, order and administrative reviews). Thus, WTO disputes involving countervailing duty proceedings may present implementation issues very similar to those present in the Dutch Steel Antidumping Proceeding (*i.e.*, whether revocation of a countervailing duty order would affect administrative reviews undergoing judicial review) and similarly would require a remand pursuant to *Food Store Employees Union*.

applied to one of the prior steps in the agency proceeding (*e.g.*, an antidumping investigation), the *Food Store Employees Union* rule requires a remand to determine whether this change in policy will affect subsequent parts of the administrative proceeding. Moreover, the likelihood of such a recurrence is great in light of the fact that a clear majority of WTO disputes involve antidumping and countervailing proceedings.

Furthermore, it is not just in Federal Circuit appeals involving Commerce determinations in which the *Food Store Employees Union* rule can be implicated. For example, the Federal Circuit reviews Commission injury determinations in antidumping proceedings.[17] If the Commission were to announce a change in policy as to injury investigations, the *Food Store Employees Union* rule would require a remand if a court were reviewing agency action taken pursuant to the prior policy. Similarly, the Federal Circuit reviews Customs' determinations, such as customs rulings which determine under what tariff classification and at what rate a good should enter the United States.[18] If, for example, Customs were to change its policy for determining tariff classification, the *Food Store Employees Union* rule would require a remand if a court were reviewing agency action taken pursuant to the prior policy. The Federal Circuit also hears numerous other appeals involving agency action and agency policies and its

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[17] 28 U.S.C. § 1295(a)(5) (the Federal Circuit has exclusive jurisdiction of an appeal from a final decision of the Court of International Trade); *see also* 28 U.S.C. § 1581(c) (stating that the Court of International Trade has exclusive jurisdiction over civil actions commenced under section 516A of the Tariff Act of 1930 (*i.e.*, antidumping and countervailing duty determinations, including Commission injury determinations).

[18] 28 U.S.C. § 1295(a)(5) (the Federal Circuit has exclusive jurisdiction of an appeal from a final decision of the Court of International Trade); *see also* 28 U.S.C. § 1581(h) (stating that the Court of International Trade has exclusive jurisdiction over Customs' rulings, including classification and valuation rulings).

jurisdiction is not limited to matters involving international trade.[19] Because Federal Circuit precedent contradicts the precedent of the D.C. Circuit—the other court of appeals with substantial responsibility for reviewing agency action—it creates an unwarranted conflict in the law governing federal agencies.

Finally, the need for a remand is certain to occur in an ongoing appeal to the Federal Circuit of the second administrative review of the Dutch Steel Antidumping Order.[20] *Corus Staal BV v. United States,* Appeal No. 2006-1652, appealed from the U.S. Court of International Trade, Case No. 05-CV-00354. For the reasons discussed above regarding the first administrative review, Commerce's announced change in policy in the Dutch Steel Antidumping Proceeding requires a remand in the second administrative review as well. Just as Commerce will have to determine whether the abandonment of zeroing should affect the first administrative review, Commerce also will have to determine whether it should affect the second administrative review. This is particularly the case because it is uncontested that the change in policy will lead to a negative dumping determination, thus invalidating the Dutch Steel Antidumping Order and re-

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[19] *See generally* 28 U.S.C. § 1295(a) (describing the jurisdiction of the Federal Circuit to include, *inter alia*, determinations of the U.S. Patent and Trademark Office, the Secretary of Commerce, the Merit Systems Protection Board, and an agency board of contract appeals).

[20] As discussed *supra* p. 5, pursuant to a request from "interested parties" (*e.g.*, the U.S. domestic industry or foreign producers), Commerce conducts annual administrative reviews of antidumping orders in order to establish the amount of duties to be assessed on entries covered by the administrative review and to establish the cash deposit rates for future entries. In the Dutch Steel Antidumping Proceeding, Commerce has concluded the first and second administrative reviews and is currently conducting the fourth and fifth administrative reviews. The third administrative review was not conducted because of a lack of interest from interested parties.

quiring termination of the Dutch Steel Antidumping Proceeding. A remand is required, therefore, in order for Commerce to determine whether any agency action may be taken pursuant to the invalidated order in either the first administrative review or the second administrative review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 25, 2007

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

[Filed SEP 12, 2006]

ORDER

A petition for rehearing en banc having been filed by the Appellant, and the matter having first been referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED. The mandate of the court will issue on September 19, 2006.

FOR THE COURT,

/s/ Jan Horbaly
JAN HORBALY
Clerk

cc: Joel D. Kaufman
Claudia Burke, John J. Mangan

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

[Filed JUN 13, 2006]

05-1600

CORUS STAAL BV,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee,

and

UNITED STATES STEEL CORPORATION,
Defendant-Appellee.

JUDGMENT

ON APPEAL from the United States Court of International Trade.

IN CASE NOS. 04-00316

This CAUSE having been heard and considered it is ORDERED and ADJUDGED:

AFFIRMED. *See* Fed. Cir. R. 36.

Per Curiam (RADER, *Circuit Judge*, PLAGER, *Senior Circuit Judge*, and LINN, *Circuit Judge*.)

ENTERED BY ORDER OF THE COURT

/s/ Jan Horbaly
JAN HORBALY, Clerk

APPENDIX B

UNITED STATES COURT OF INTERNATIONAL TRADE

Court No. 04-00316
Before: Jane A. Restani, Chief Judge

CORUS STAAL BV,

Plaintiff,

v.

UNITED STATES,

Defendant,

and

UNITED STATES STEEL CORPORATION,

Defendant-Intervenor.

OPINION

Restani, *Chief Judge*: This matter is before the court on the plaintiff Corus Staal BV's ("Corus") motion for judgment on the agency record pursuant to United States Court of International Court No. 04-00316 Page 2 Trade Rule 56.2. At issue are the final results of the first administrative review of an antidumping duty order by the International Trade Administration of the United States Department of Commerce ("Commerce" or "Department") of hot-rolled steel from the Netherlands. *See Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands*, 69 Fed. Reg. 33,630 (Dep't Commerce June 16, 2004) (final admin. rev.), *as amended by*, 69 Fed. Reg. 43,801 (Dep't Commerce July 22, 2004) (am. final admin. rev.) [hereinafter *Final Results*].

Corus claims (1) that the agency's use of a "zeroing" methodology is contrary to law, and (2) that its use of the date of entry (instead of the date of sale) for selection of certain export price ("EP") transactions is both contrary to law and

unsupported by substantial evidence. Corus claims that zeroing, whereby "negative dumping margins," *viz*, where the U. S. price is higher than the normal value ("NV"), are set to zero in calculating Corus's weighted average dumping margin (and concomitant assessment rate) do not properly allow non-dumped sales to offset dumped sales, introducing an "improper statistical bias into the calculation." Pl.'s Br. at 2. Corus further claims that this court and the Court of Appeals for the Federal Circuit have held that zeroing is not required by statute, and, therefore, this court may only uphold Commerce's methodology if it is reasonable, which Corus asserts it no longer is, given the WTO Antidumping Agreement, see Pub. L. No. 103- 465, 108 Stat. 4809 (1994), and recent WTO decisions.[1]

In addition, Corus argues that Commerce erred legally and factually by using the date of entry to select certain EP transactions for review, which it asserts is inconsistent with its use of the date of sale for other EP transactions and all constructed export price ("CEP") sales. Because, allegedly, Commerce offered no reasonable explanation for basing its review in some instances on the date of sale and in others on the date of entry, and offered no explanation for deviating from its prior and exclusive use of the date of sale as a

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[1] *See, e.g., United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, 2004 WTO DS LEXIS 18 (Aug. 11, 2004, adopted Aug. 31, 2004) (appellate body report) ("*Softwood Lumber*"); *United States—Sunset Review of Anti-Dumping Duties on Corrosion-resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, 2003 WTO DS LEXIS 218 (Dec. 15, 2003, adopted Jan. 9, 2004) (appellate body report) ("*Corrosion-resistant Steel*"); *European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, 2001 WTO DS LEXIS 13 (Mar. 1, 2001, adopted Mar. 12, 2001) (appellate body report) ("EC-Bed Linen").

selection criterion in its preliminary results,[2] Corus asks the court to enter an order remanding this administrative review to Commerce. Corus also asks this court to instruct Commerce, on remand, (1) to re-calculate Corus's dumping margin, cash deposit rate, and assessment rate without resort to zeroing; (2) to use, exclusively, the date of sale to select the transactions to be reviewed during the period of review ("POR") (instead of date of sale for CEP transactions and a combination of date of sale and date of entry for EP transactions); and (3) to refund the amount of estimated antidumping duty deposits collected in excess of the lawful amount.

In response to plaintiff's motion, both the defendant ("Government" or "Commerce"), and the United States Steel Corporation ("U. S. Steel"), the defendant-intervenor, argue that Corus's motion, with respect to zeroing, should be denied because the final results are in accordance with law. Commerce, citing decisions by this court and the Federal Circuit, which have both repeatedly sustained Commerce's methodology, asserts: (1) zeroing is a "reasonable" interpretation of an ambiguous statutory provision regarding dumping margins and weighted average dumping margins, *see* 19 U.S.C. § 1677(35) (2000); and (2) the WTO reports cited by Corus are legally irrelevant, for numerous reasons. U. S. Steel agrees with Commerce that the Department's use of zeroing was proper, and that Corus's reliance on WTO decisions is misplaced, but also asserts that zeroing is not merely in accordance with law but that its use is actually required by law.

As for the second issue, regarding Commerce's classification of certain U. S. sales as EP sales, Commerce and U.S. Steel disagree. Commerce asks the court to remand the issue

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[2] *See Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands*, 68 Fed. Reg. 68,341 (Dep't Commerce Dec. 8, 2003) (prelim. admin. rev.) [hereinafter *Prelim. Results*].

to Commerce to re-classify certain EP transactions; U.S. Steel requests that the plaintiff's motion, in all respects, be denied. U.S. Steel asserts that Corus mischaracterized certain sales (those made to its just-in-time ("JIT") customers) as EP sales, and argues that any sales made after importation must, according to the statutory terms, *see* 19 U.S.C. § 1677a(a)–(b) (2000), be CEP sales. U.S. Steel further argues that the Department properly utilized its standard methodology of using the date of sale during the POR for CEP sales (and for EP-classified sales made after importation, such as CEP sales normally are), and of using the date of entry for ordinary EP sales. As explained below, the court concludes that remand is not appropriate and the final results of the administrative review are sustained.

PROCEDURAL HISTORY

This appeal arises out of the first administrative review of an antidumping duty order regarding hot-rolled steel from the Netherlands. U. S. Steel, a domestic producer of hot-rolled steel, and a defendant-intervenor in these proceedings, was both a petitioner in the investigation that resulted in Commerce's antidumping duty order and an active participant in the administrative proceedings below. Corus, the plaintiff, is a producer of hot-rolled steel in the Netherlands and brought this appeal to challenge two aspects of the final results that pertain to the calculation methodology Commerce used to determine the 4.80% weighted average dumping margin applicable to Corus: (1) zeroing; and (2) the change in selection criterion from date of sale, to date of sale for all CEP transactions and certain EP transactions and date of entry for the remaining post-importation EP sales. *See Final Results*, 69 Fed. Reg. at 33,631 and accompanying *Issues & Decision Mem.* [hereinafter "*Issues Mem. to Steel from the Netherlands*"], at cmts. 4, 10, *as amended by*, 69 Fed. Reg. at 43,802.

On November 29, 2001, Commerce published the antidumping duty order on certain hot-rolled carbon steel flat products from the Netherlands. *See Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands*, 66 Fed. Reg. 59,565 (Dep't Commerce Nov. 29, 2001) (antidumping duty order). On November 1, 2002, Commerce published notice of the opportunity to request an administrative review of certain hot-rolled carbon steel flat products from the Netherlands, covering the period from May 3, 2001, to October 31, 2002. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation*, 67 Fed. Reg. 66,612 (Dep't Commerce Nov. 1, 2002) (opportunity to req. admin. rev.).

On November 26 and 27, 2002,[3] a group of U. S. steel companies, including U.S. Steel, pursuant to 19 C.F.R. 351.213(b)(1) (2004),[4] requested that Commerce, in accordance with 19 U.S.C. § 1675 (2000),[5] conduct an administrative review of Corus's sales of the subject merchandise. On December 26, 2002, Commerce published a notice of initiation of this antidumping duty administrative review, covering the period from May 3, 2001, through October 31, 2002. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 67 Fed. Reg. 78,772 (Dep't Commerce Dec. 26, 2002). On January 9, 2003, Commerce issued its

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[3] Nucor Corporation filed its request for administrative review on November 26, 2002; Bethlehem Steel Corporation, National Steel Corporation, and U.S. Steel filed their request on November 27, 2002. *Prelim. Results*, 68 Fed. Reg. at 68,342 n.1.

[4] Allowing domestic interested parties to request an administrative review of an antidumping or countervailing duty order each year during the anniversary month of the order's publication.

[5] Providing for periodic review of duty order amount, at least once during each 12-month period, beginning on the anniversary of the date of publication of the antidumping duty order, if a request for such a review has been received.

antidumping duty questionnaire to Corus—an ongoing question and response process that lasted from then until May 19, 2003, when Corus responded to Commerce's third supplemental questionnaire. *See Prelim. Results*, 68 Fed. Reg. at 68,342. Commerce then verified Corus's submitted data and requested Corus to report entered value data. *See id.* Also, as a result of the court's decision in *Corus Staal BV v. United States*, 283 F. Supp. 2d 1357, 1358 (Ct. Int'l Trade 2003), the Department will not assess duties on subject merchandise that entered between October, 30, 2001, and November 28, 2001, inclusive. *See also Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands*, 68 Fed. Reg. 60,912, 60,912 (Dep't Commerce Oct. 24, 2003) (final ct. decision & suspension of liquidation).

On December 8, 2003, Commerce published its preliminary results from the administrative review of the antidumping duty order on hot-rolled steel from the Netherlands. *See Prelim. Results*, 68 Fed. Reg. at 68,341. After issuance of these preliminary results, the Department invited comments; and in response, Corus, U. S. Steel, and Nucor filed case briefs on January 14, 2004, and submitted rebuttal briefs on January 23, 2004. *See Final Results*, 69 Fed. Reg. at 33,630. After Corus timely-filed a ministerial error allegation, in accordance with 19 C.F.R. 351.224(c)(2) (2004),[6] the Department revised its antidumping duty margin for Corus, decreasing it from the original 4.94% assessment to the currently contested 4.80% ad valorem. *See Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands*, 69 Fed. Reg. 43,801, 43,801–02 (Dep't Commerce July 22, 2004) (am. final admin. rev.). Corus timely commenced this action

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[6] Setting five days as the time limit for submitting comments regarding ministerial errors.

under 19 U.S.C. § 1516a(a)(2)(A)(i),[7] (B)(iii)[8] (2000), and 28 U.S.C. § 1581(c) (2000).

JURISDICTION & STANDARD OF REVIEW

The court has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2) and 28 U.S.C. § 1581(c). The court, in reviewing one of Commerce's administrative determinations, will uphold the challenged determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Commerce's Request For Remand Is Denied

Prior to oral argument, the court denied Commerce's request for a remand. The request was both unsupported and unexplained. With respect to the classification of sales as EP or CEP, Commerce simply stated that "[u]pon further review . . . certain transactions were mistakenly classified as EP transactions." Resp. Br. at 26.

In *SKF USA, Inc. v. United States*, 254 F.3d 1022, 1028 (Fed. Cir. 2001), the Court of Appeals addressed the issue of a voluntary remand when Commerce's original determination, denying a favorable adjustment to the plaintiff-appellant, was not required by statute. After initially determining, during the administrative review, that the loss incurred on the sale of a subsidiary should be included in the plaintiff's general and administrative ("G&A") expense calculation, Commerce, on appeal before the Court of International Trade, "reversed course," and instead of defending its final results, sought a remand, arguing, in accordance with the

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[7] Allowing review of administrative determinations on the record within thirty days of the date of publication in the Federal Register.

[8] Defining reviewable determinations to include final determinations by the "administering authority" (Commerce) or the "Commission" (International Trade Commission) under 19 U.S.C. § 1675.

plaintiff's position, that the loss should no longer be included in the G&A expense calculation. *Id.* at 1026.

Obviously, this case differs from *SKF* because Commerce's remand request is not so that it may bestow a benefit on the party paying duties. Here, the request is in response to defendant-intervenor U.S. Steel's brief, which claims a misclassification—"because these so-called EP sales did not meet the statutory definition of EP," (*see* Def.-Intervenor's Br. at 25–26)—although U.S. Steel admits it missed the time for filing suit to change the classification. Nonetheless, *SKF* may be instructive because the court explained that an agency may seek a remand (1) to reconsider its decision because of intervening events outside of the agency's control; (2) to reconsider its previous position even if there are no intervening events; or (3) because it believes that its original decision was incorrect on the merits and it wishes to change the result. 254 F.3d at 1028–29.

The first situation does not apply to this case.

With respect to the second situation, the Federal Circuit explained that an agency may "simply state that it had doubts about the correctness of its decision or that decision's relationship to the agency's other policies." *Id.* at 1029. In that situation, the reviewing court has discretion over whether to remand, and may refuse a remand if the agency's request is "frivolous or in bad faith." *Id.* But, "if the agency's concern is substantial and legitimate, a remand is usually appropriate." *Id.* Here, there does not appear to be any substantial or legitimate administrative concern warranting a remand. Commerce's stated reason for requesting a remand was simply "to correct this classification so that its written position is consistent with the factual record." Def.'s Resp. Br. at 26. Commerce articulated no other policy issue or view, nor did it otherwise express any doubts about the correctness of its decision in relation to the agency's other policies.

With respect to the third situation, the court held that a "[r]emand to an agency is generally appropriate to correct simple errors, such as clerical errors, transcription errors, or erroneous calculations." *SKF*, 254 F.3d at 1029. The court explained that "[a]lthough a court need not necessarily grant such a remand request, remand may conserve judicial resources, or the agency's views on the statutory question, though not dispositive, may be useful to the reviewing court." *Id.*

Here, a remand would not seem to preserve judicial resources or permit application of Commerce's views on a statutory question. *See Corus Staal BV v. United States*, 259 F. Supp. 2d 1253, 1257 (Ct. Int'l Trade 2003) ("*Corus Staal I*") ("[C]oncerns for finality do exist and the agency must state its reasons for requesting remand. Further, if only to guard against the 'bad faith' requests of concern to the court in *SKF*, the court must be apprised of the reason for the remand request, whether it be on account of error or merely a change in policy.").

While there was a vague reason given here, which exceeds the information provided in the earlier *Corus Staal I* case, this was still insufficiently informative. There is no real evidence that Commerce erred. While the EP sales at issue appear were invoiced after importation, a hallmark of CEP sales, the statute does permit, inter alia, "post-importation" EP sales where the sale is pre-negotiated. *See* 19 U.S.C. § 1677a(a) ("The term 'export price' means the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation . . . ."). Thus, if an error did occur, Commerce needed to explain it in detail.

Furthermore, U.S. Steel avers that reclassifying the sales from EP to CEP would have an insignificant effect on the dumping margin, and it does not seek this relief. Accordingly, if the court has discretion over whether to grant this remand request, the court exercises such discretion to deny this

request for remand, which likely would simply delay this matter for no substantial reason.

The court is concerned that Commerce is taking some broad language in the *SKF* decision, the holding of which may apply to a very narrow group of cases, out of context, simply to avoid dealing with difficult methodological issues. In this case, Commerce did not even brief the issue of the proper date for selection of EP and CEP sales, relying instead on its unsupported request for remand to delay the day of reckoning. This was a disservice to the court, as the court must resolve this issue. The interests of both plaintiffs and defendants depend on the prompt and orderly resolution of these matters, which Congress clearly intended.[9] The Government must give due regard to finality and cannot simply ask for a do-over any time it wishes.

II. Commerce's Use Of Zeroing Is Reasonable And In Accordance With Law

As Corus noted in its brief, numerous cases before this court and the Federal Circuit have held that "zeroing" is neither required nor prohibited by the U.S. statute, *see* 19

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[9] Reflecting the need for expedition in these matters, United States Court of International Trade Rule 3(g) provides for the precedence of unfair trade cases over most other actions, and the statute contains a series of time limitations on Commerce's actions. *See* USCIT Rule 3(g) (listing an action contesting a determination in a countervailing or antidumping duty proceeding third in order of precedence, following only an action seeking injunctive relief and an action involving the exclusion or redelivery of perishable merchandise); 19 U.S.C. § 1675(a)(3)(A) (requiring, if practicable, "[t]he administrating authority [to] make a preliminary determination [in a review as to the amount of any antidumping duty] within 245 days after the last day of the month in which occurs the anniversary of the date of publication of the order, finding, or suspension agreement for which the review . . . is requested, and a final determination . . . within 120 days after the date on which the preliminary determination is published.").

U.S.C. § 1677(35)(A),[10] (B),[11] in either an investigation, *see, e.g., Corus Staal I*, 259 F. Supp. 2d at 1261, or an administrative review, *see, e.g., Timken Co. v. United States*, 354 F.3d 1334, 1341–42 (Fed. Cir.), *cert. denied*, 125 S. Ct. 412 (2004) ("*Timken*").

Despite these prior holdings, Corus argues that fundamental structural changes to the U.S. Antidumping statute, as implemented in the Uruguay Round Agreements Act ("URAA"), render zeroing inherently unreasonable, citing recent WTO decisions for further support that zeroing is no longer reasonable. *See supra* note 1. The Federal Circuit, however, in addressing arguments similar to the ones Corus now presents before the court, (1) expressly affirmed the reasonableness of Commerce's use of zeroing in an antidumping administrative review, and (2) accorded no deference to Corus's cited WTO cases, again concluding that WTO decisions are not binding on the U.S. and cannot trump domestic legislation. *See Corus Staal BV v. Dep't of Commerce*, 395 F.3d 1343, 1346–49 (Fed. Cir. 2005) ("*Corus Staal II*") (holding that (1) "[o]ur decision in *Timken* addressed Commerce's interpretation of section 1677(35);" and (2) "[w]e give Commerce substantial deference in its administration of the statute because of the foreign policy implications of a dumping determination"). While it is highly debatable whether the intricacies of margin calculation involve foreign policy, the Government's response to WTO

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[10] 19 U.S.C. § 1677(35)(A). The statute states: "The term 'dumping margin' means the amount by which the normal value *exceeds* the export price or constructed export price of the subject merchandise." (emphasis added).

[11] 19 U.S.C. § 1677(35)(B). The statute states: "The term 'weighted average dumping margin' is the percentage determined by dividing the aggregate *dumping margins* determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer." (emphasis added).

decisions vary; and, as the Federal Circuit noted, a court should "not attempt to perform duties that fall within the exclusive province of the political branches." *Id.* at 1349. Because decisions by the Federal Circuit are binding on this court, Corus's arguments regarding the reasonableness of zeroing, therefore, must fail.

Corus's final argument was also addressed by the Federal Circuit in *Corus Staal II*; however, Corus now relies on changed facts. Specifically, Corus attempts to capitalize on the Federal Circuit's caveat in *Corus Staal II*: "[W]e . . . refuse to overturn Commerce's zeroing practice based on any ruling by the WTO or other international body *unless and until* such ruling has been adopted pursuant to the specified statutory scheme." *Id.* (emphasis added). Corus argues that the WTO's *Softwood Lumber* decision, which prohibited the use of zeroing in calculating dumping margins under the weighted-average-to-weighted-average methodology, has been "adopted pursuant to the specified statutory scheme," and therefore, the court should rule zeroing no longer reasonable, not based on the WTO ruling itself, but on Commerce's re-interpretation of its policy in the wake of the adverse *Softwood Lumber* ruling.

Before any agency regulation or practice can be modified to conform to an adverse WTO ruling, Commerce must follow the particular statutory scheme Congress enacted. *See id.* This process mandates consultation between the various political branches of the Executive and Congress "to determine whether or not to implement WTO reports and determinations and, if so implemented, the extent of implementation." *Id.; see also* 19 U.S.C. §§ 3533(f)–(g), 3538 (2000).[12]

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[12] These steps include: (1) consultation between the U.S. Trade Representative ("USTR"), agency, relevant congressional committees, and the private sector; (2) notice and comment; (3) publication of the modification and its explanation in the Federal Register; and (4) further consultation

Corus submits that the "critical steps" had already been taken by the time of the Federal Circuit's decision in *Corus Staal II*.[13] In *Corus Staal II*, the Federal Circuit was quite clear that it "reject[ed] *Softwood Lumber* as nonbinding because the finding therein was not adopted as per Congress's statutory scheme." 395 F.3d at 1349. Therefore, until all of the statutorily mandated procedures have been fully complied with, it matters not whether the "critical steps" have already been taken. Since the Federal Circuit issued its opinion in *Corus Staal II*, Commerce has subsequently issued both its preliminary and final determinations to implement *Softwood Lumber*. *See Notice of Determination Under Section 129 of the Uruguay Round Agreements Act: Antidumping Measures on Certain Softwood Lumber Products from Canada*, Pl.'s Addendum 1 (Apr. 15, 2005) ("*Sec. 129 Determ.*"). Corus stresses that the determination has been forwarded to the USTR, but Commerce correctly notes that the USTR still must direct the Department to implement the determination, "in whole or in part." *Sec. 129 Determ.* at 1, 38. *See* 19 U.S.C. § 3538(b)(4).[14] Thus, the statutorily mandated procedure is incomplete.

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between the USTR, agency, and relevant congressional committees regarding implementation of the new determination.

[13] Corus identifies the "critical steps" as (1) U. S. notification to the WTO that it would implement the *Softwood Lumber* decision, (2) consultation with Commerce and Congress, and (3) instruction by the USTR directing Commerce to draft a section 129 determination implementing *Softwood Lumber*. Pl.'s Reply Br. at 3 n.2.

[14] 19 U.S.C. § 3538(b)(4) states that "[t]he Trade Representative *may*, after consulting with the administering authority and the congressional committees . . . , direct the administering authority to implement, in whole or in part, the determination . . . ." (showing that even after a final determination, the USTR need not instruct Commerce to implement it) (emphasis added).

Even if the USTR had directed the Department to implement the determination in full, it still would not be applicable to this case.[15] Unlike a section 123 proceeding, which concerns implementation of panel reports regarding a WTO member's general practices, a section 129 report only affects the implementation of the specific investigation at issue, in this case softwood lumber from Canada. *Compare* URAA § 123, 19 U.S.C. § 3533, *with* URAA § 129, 19 U.S.C. § 3538.[16] Moreover, the WTO Appellate Body's report in *Softwood Lumber* made clear that the only issue before it was zeroing "*as applied*" in that case to Canadian lumber: "no methodology, *as such*, has been challenged." *Softwood Lumber*, WT/DS264/AB/R at ¶ 63 (emphases in original). Further, even if the general methodology were at issue, section 129(c)(1) of the URAA, 19 U.S.C. § 3538(c)(1), explicitly provides that any section 129 redetermination by Commerce will only affect the unliquidated entries of subject merchandise that "are entered, or withdrawn from warehouse, for consumption *on or after* . . . the date on which the Trade Representative directs the administering authority . . . to implement that determination." 19 U.S.C. § 3538(c)(1)(A) (emphasis added). In its section 129 determination, Commerce notes that the "SAA clearly provides,

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[15] On April 27, 2005, in accordance with sections 129(b)(4) and 129(c)(1)(B) of the URAA, 19 U.S.C. § 3538(b)(4), (c)(1)(B), the USTR, after consulting with Commerce and Congress, directed the Department to implement the determination. *See Antidumping Measures on Certain Softwood Lumber Products from Canada*, 70 Fed. Reg. 22,636 (Dep't Commerce May 2, 2005) (final determ. under sec. 129 of URAA) [hereinafter *Final Section 129 Determination*].

[16] Section 123(f)(3) discusses generally "whether to implement the [WTO] report's recommendation" and section 123(g)(1) regards "[c]hanges in agency regulations or practice." 19 U.S.C. § 3533(f)(3), (g)(1). Section 129, in contrast, discusses everything in terms of "particular proceedings," from the initial agency action, to the re-determination, to the implementation of the re-determination. 19 U.S.C. § 3538.

'such [section 129] determinations have prospective effect only.'" URAA Statement of Administrative Action, accompanying H.R. Rep. No. 103-316, at 1026 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4313 ("SAA"); *Sec. 129 Determ.* at 4; *Final Sec. 129 Determ.*, 70 Fed. Reg. at 22,637.

Lastly, even Commerce's section 129 determination implementing *Softwood Lumber* limits the effect of the adverse WTO ruling. In the redetermination, Commerce changed its methodology from using a weighted-average-to-weighted-average methodology, which was the subject of the "as applied" challenge in *Softwood Lumber*, to using an individual-to-individual transaction methodology. *See Sec. 129 Determ.* at 6, *Final Sec. 129 Determ.*, 70 Fed. Reg. at 22,637. Commerce's change, however, is "not inconsistent with the findings of the panel or the Appellate Body," *see* 19 U.S.C. § 3538(b)(2), because the individual-to-individual methodology, as the WTO Appellate Body noted, was not addressed by its *Softwood Lumber* ruling. *Softwood Lumber*, WT/DS264/AB/R at ¶ 63. Underscoring the specificity of this change, Commerce noted that by switching its methodology it was "not intending to implement an approach that applies to all antidumping investigations." *Sec. 129 Determ.* at 12; *Final Sec. 129 Determ.*, 70 Fed. Reg. at 22,639. Even with respect to the *Softwood Lumber* investigation, and despite employing the changed methodology, Commerce still used zeroing. In its redetermination, Commerce stated that because the WTO ruling "requires the offset for non-dumped sales [i.e., does not allow zeroing] only for a weighted-average-to-weighted-average comparison, we have not applied the offset for non-dumped sales [i.e., we have used zeroing] in our transaction-to-transaction comparison." *Id.* Therefore, even if the USTR directs Commerce to implement the process in one case, the overall process has not changed.

In sum, the WTO decision-making process operates apart from the decision-making in this court. WTO decision-mak-

ing starts with an international agreement, which may not match the domestic statute and which is interpreted pursuant to different principles. From there, the process follows an entirely separate implementation scheme. Had the Government appeared here saying it had lost in the WTO, with respect to this very administrative determination, and it had complied with the entire statutory framework, to the effect that it was reversing its position, even as to a past determination, then the court would have to consider what to do. This, however, has not happened, and the court is bound by circuit precedent upholding zeroing.

III. Commerce's Change In Methodology For Selecting The Sales Used In The Margin Calculation Is Reasonable And In Accordance With Law

Corus's database consists of two categories of U.S. sales: constructed export price sales, which were made through Corus's U. S. affiliate, and export price sales, which were made by Corus.[17] In the *Preliminary Results*, Commerce selected the U.S. sales to be included in the margin calculation, regardless of whether the sale was CEP or EP, on the basis of whether the date of sale was within the POR. This meant that certain EP sales—those with a date of sale prior to

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[17] "'[E]xport price' means the price at which the subject merchandise is first sold (or agreed to be sold) *before the date of importation* by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States, as adjusted under subsection (c)." 19 U.S.C. § 1677a(a) (emphasis added).

"'[C]onstructed export price' means the price at which the subject merchandise is first sold (or agreed to be sold) in the United States *before or after the date of importation* by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter, as adjusted under subsections (c) and (d)." *Id.* at § 1677a(b) (emphasis added).

the POR but with an entry date during the POR—were excluded from the margin calculation.

Prior to the *Final Results*, U. S. Steel argued in its case brief that the date of sale methodology used to select U.S. sales was incorrect, as applied to Corus's EP sales. In support, U. S. Steel showed that, consistent with Commerce's antidumping questionnaire, Commerce's normal practice was to use date of sale for CEP sales and date of entry for EP sales. *See Commerce's Antidumping Duty Questionnaire* (Jan. 9, 2003), at C-1, P.R. Doc. 207, Def.-Intervenor's App., Tab 1, at 2 ("Report each U.S. sale of merchandise entered for consumption during the POR, except: (1) for EP sales, if you do not know the entry dates, report each transaction involving merchandise shipped during the POR; and (2) for CEP sales made after importation, report each transaction that has a date of sale within the POR."). EP sales, which by statute must take place prior to importation (i.e., date of entry) normally can be tied to entries during the period. CEP sales, on the other hand, which may take place following importation, are often difficult or impossible to tie to specific entries.

In response, Corus argued that the sales-based approach used in the *Preliminary Results* should be applied to all of its sales to ensure no transactions escape review because: (1) date of sale corresponds to its audited financial records and its use would require no end-of-period reconciliations, and (2) given the length of time between entry date and date of sale for the JIT inventory sales, there likely would be entries sold from JIT inventory that would not be invoiced until after the conclusion of the review period and, thus, too late to be captured by the review; and under Commerce's entry date methodology, such sales would never be reported because they could not be included in any subsequent review. *See* Corus's Reply Br., (Jan. 23, 2004), at 7–9, P.R. Doc. 80, Pl.'s App., Tab 3, at 4–6; *see also Issues Mem. to Steel from the Netherlands*, at cmt. 10.

In the final results, Commerce rejected Corus's position. Commerce stated that

> We agree with petitioners. In accordance with the Department's normal practice, for those sales which occurred prior to importation, we have used the date of entry to select those transactions used in our analysis. This methodology comports with the Department's standard administrative review questionnaire, which instructs respondents to report such sales of merchandise which entered for consumption during the POR. This methodology is also consistent with that used in other antidumping duty administrative reviews. Thus, for these final results, we have amended our margin calculation program so that for sales which occurred prior to importation, the entry date was used to define those sales used in our analysis.

Issues Mem. To Steel from the Netherlands (June 16, 2004), at cmt. 10, P.R. Doc. 398, Def.-Intervenor's App., Tab 6, at 4 (citation omitted). In implementing its decision, Commerce did the following: (1) for sales classified as CEP, it continued to use the date of sale; (2) for sales classified as EP, where the sale took place prior to importation, it used the date of entry; and (3) for sales classified as EP, but where the invoice date (and hence the shipment date and presumed date of sale) took place after importation, it used the date of sale.

A. Commerce Properly Used Its Normal Method For Corus's CEP And Pre-Importation EP Sales

Corus argues that Commerce should have used the date of sale methodology for all of its sales. Corus further argues that Commerce may not use different bases (which it refers to as "hybrid") in the same administrative review to select the sales to be analyzed. U.S. Steel disagrees.

The statute does not specify whether Commerce should use the date of entry or the date of sale as the basis on which to

select transactions for review. *See Helmerich & Payne, Inc. v. United States*, 22 CIT 928, 933, 24 F. Supp. 2d 304, 310 (1998) ("[T]he statute is silent with respect to the universe of sales to be used in calculating dumping margins . . . ."). Commerce has adopted a regulation, however, that gives it the flexibility to use date of sale, date of export, or date of entry, as appropriate. The regulation provides that

> [f]or requests received during the first anniversary month after publication of an order . . . an administrative review under this section will cover, as appropriate, *entries, exports, or sales* during the period from the date of suspension of liquidation . . . to the end of the month immediately preceding the first anniversary month.

19 C.F.R. § 351.213(e)(1)(ii) (emphasis added).

Commerce's general preference is to use entries during the POR as the basis for selecting the U.S. sales to be analyzed. In *Certain Welded Carbon Steel Pipes and Tubes from Thailand*, 63 Fed. Reg. 55,578, 55,589 (Dep't Commerce Oct. 16, 1998) (final admin. rev.), for example, Commerce analyzed all U. S. sales that entered during the POR, stating that

> [a]lthough the Department's regulations at section 352.213 (e) provide some flexibility in this issue, the Department's preference is to review sales based on entry dates unless there are compelling circumstances that warrant a different approach to determining the universe of sales to be examined during a particular review.

Id. at cmt. 9. Similarly, in *Issues & Decision Memorandum to Certain Corrosion-Resistant Carbon Steel Flat Products from Canada*, 70 Fed. Reg. 13,458 (Dep't Commerce Mar. 21, 2005) (final admin. rev.), the Department explained that

> [w]e note that in section 751(a)(2)(A) of the Act [19 U.S.C. § 1675(a)(2)(A)], a dumping calculation should

> be performed for each entry during the POR. While section 351.213(e) of the Department's regulations does give the Department some flexibility in this regard by stating that the review can be based on entries, exports, or sales, it is our preference to base the review on entries where possible. In this case, we find no compelling reason to move away from our standard practice of using entries to determine the universe of U.S. sales to be reported for EP sales.

Id. at cmt. 5. *See also Helmerich*, 22 CIT at 935–36, 24 F. Supp. 2d at 311 (quoting Commerce as stating that its "usual practice in export price situations is to review and assess duties on entries within the POR, regardless of whether the sales occurred prior to the review period"). Therefore, Commerce's review of the EP sales in this case, based on the date of entry, is in accordance with its standard methodology.

Furthermore, the court has upheld Commerce's entry-based methodology as reasonable. In *Helmerich*, the court upheld Commerce's use of the date of entry as a selection criterion, even though the merchandise that entered during the POR came from a foreign trade zone and had been sold to the customer before the POR and before the antidumping duty order had been entered. 22 CIT at 928, 938–39, 24 F. Supp. 2d at 306, 313–14. The court explained that the entry-based approach resulted in a more accurate measure of dumping and ensured that all relevant sales were considered. *Id.* at 937–38, 24 F. Supp. 2d at 313.

Although Commerce's general preference is to use the date of entry, it often uses the date of sale as the selection criterion for CEP sales. This is because, in many CEP situations, the sale is made after importation and it is often difficult or impossible to tie entries to sales. *See id.* at 938 n.9, 24 F. Supp. 2d at 313 ("In certain situations such as CEP situations where Commerce cannot tie entries to future sales, or when the Department cannot ascertain entry dates, Commerce

cannot calculate margins based on sales linked to entries. Therefore, Commerce may resort to the less accurate approach of calculating margins based on possibly unlinked sales during the POR."); *see also Dynamic Random Access Memory Semiconductors of One Magabit or Above from the Republic of Korea*, 66 Fed. Reg. 30,688, 30,692 (Dep't Commerce June 7, 2001) (prelim. admin. rev.) (using sales made during the POR to calculate the weighted-average dumping margins for CEP transactions). This approach has been upheld as reasonable.

In *NSK Ltd. v. United States*, 17 CIT 590, 594–95, 825 F. Supp. 315, 320 (1993), for example, the court upheld Commerce's decision to examine exporter's sales price ("ESP") transactions (now CEP transactions under the URAA) on the basis of sales made during the POR. In holding, *inter alia*, that Commerce's review of all CEP sales made during the POR, rather than review of only the subject merchandise entered and sold during the review period, was reasonable and in accordance with the law, the court noted Commerce's reasoning with respect to these CEP sales: (1) there is usually a lag time between entry and sale, (2) entry data is often unavailable, (3) a dumping margin cannot be determined without a sale, (4) dumping on sales made during the POR is representative of dumping on entries made during the POR, and (5) review of sales, which can cover many entries of merchandise, can eliminate the need for conducting multiple reviews of the same information. *Id.* at 595, 24 F. Supp. 2d at 320; *see also Ad Hoc Comm. of S. Cal. Producers of Gray Portland Cement v. United States*, 19 CIT 1398, 1407, 914 F. Supp. 535, 544 (1995) (upholding Commerce's use of sales, rather than entries, during the POR to calculate a dumping margin as selection criterion for CEP sales). Therefore, Commerce's use of the date of sale as a selection criterion for Corus's CEP sales is in accordance with its standard procedure and is reasonable.

Corus relies on *Hynix Semiconductor, Inc. v. United States*, 248 F. Supp. 2d 1297 (Ct. Int'l Trade 2003), to argue that Commerce's "hybrid" methodology—using date of entry to select those EP transactions where the sale had occurred prior to importation, but using date of sale to select all other EP and all CEP transactions—is unreasonable.[18] In *Hynix*, the court sustained Commerce's decision to use the date of sale as the selection criterion for CEP sales at issue. *Id.* at 1303–04. The court found that Commerce properly abandoned the method used in the preliminary results, where it had calculated the dumping margin by using the CEP sales made during the POR, plus CEP entries made during the period (which were sold after the POR). *Id.* at 1300. The court explained that "nothing in Commerce's regulations supports the use of a hybrid sales plus POR-entries approach for calculating dumping margins." *Id.* at 1304. This case is different. Here, Commerce did not use such a "hybrid" approach; it used two distinct approaches—sales during the POR for CEP transactions and entries during the POR for pre-importation EP transactions—both of which were previously upheld as reasonable.

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[18] Corus also relies on *Hynix* to argue that Commerce should have continued to use the same approach to be consistent with its *Preliminary Results*. Although the *Hynix* court did recognize the value of being consistent *across* administrative reviews, *see* 248 F. Supp. 2d at 1304 (noting that *Hynix* involved the sixth administrative review), the review here, in contrast, is only the first administrative review of Corus's sales and hence, there is no prior review with which to be consistent. *See Helmerich*, 22 CIT at 937 n.8, 24 F. Supp. 2d at 313 ("In contrast [to *Portable Electric Typewriters from Japan*, 56 Fed. Reg. 56,393, 56,393 (Dep't Commerce Nov. 4, 1991), which was a review covering the periods May 1, 1988, through April 30, 1989, and May 1, 1989, through April 30, 1990, for an antidumping duty order entered in May 1980], this case deals with a first administrative review. Therefore, Commerce was not constrained to utilize a sales-based approach to remain consistent.").

Furthermore, in *Circular Welded Non-Alloy Steel Pipe from the Republic of Korea*, 63 Fed. Reg. 39,071, 39,072 (July 21, 1998) (am. final admin. rev.), Commerce followed this approach, reviewing all CEP sales with a sale date during the POR and all EP sales with an entry date during the POR.

Therefore, Commerce's use of the date of entry to select Corus's pre-importation EP sales, and the date of sale to select Corus's CEP sales is reasonable and in accordance with its prior practice. Thus, as to these two categories, there is no error.

B. Commerce's Use Of Sales Date To Select Corus's "Post-Importation" EP Sales Was Proper

Corus also argues that Commerce's methodology was improper because Commerce reviewed Corus's pre-importation EP sales differently from its "post-importation" EP sales.

Commerce did use the date of sale to select those EP-classified sales that Corus invoiced after importation. Yet, as discussed above, the statute defines EP sales as those transactions occurring "before the date of importation" while CEP sales may occur "before or after the date of importation." See supra note 17. Thus, because the EP sales at issue could not be treated in the same manner as the other EP sales, Commerce treated them as it treated CEP sales—by reviewing them according to date of sale, because the same matching difficulties that exist for post-importation CEP sales also exist for "post-importation" EP sales, as both sides admitted at oral argument.

Corus argues that because the only parties to these "post-importation" EP sales were Corus and the particular U. S. customer (not a U. S. affiliate), and because Corus maintained its own U. S. inventory and invoicing, the sales, were in fact, properly classified as EP sales and should have been selected

on the same basis as other EP sales.[19] In *AK Steel Corp. v. United States*, 226 F.3d 1361, 1369–70 (Fed. Cir. 2000), the Federal Circuit examined the definitions of EP and CEP and noted that the two factors dispositive of the choice between the two classifications are (1) whether the sale takes place inside or outside the United States, and (2) whether it is made by an affiliate. Referring to the CEP definition, the court then defined the term "seller" as "one who contracts to sell" and the term "sold" as the "transfer of ownership or title." *Id.* at 1371.

First, with respect to the location factor, it is undisputed that the invoicing took place in the U.S. after importation, which, as indicated, presents the same entry-sale disconnect normally associated with CEP sales. With respect to the second factor, the record shows that Corus uses a U.S.-based entity to facilitate these sales. This is particularly so in reference to the JIT inventory that Corus maintains in the U. S. for certain customers. Corus's U.S.-based affiliate, Corus Steel USA Inc. ("CSUSA") serves as a "facilitator, communications link and processor of certain documentation for [Corus's] U.S. imports and sales. CSUSA never takes title to, takes possession of, or resells Corus' steel and does not possess negotiating authority over steel manufactured by [Corus]." *See Corus Resp. to Commerce Antidumping Duty Questionnaire* (Jan. 30, 2003), at A-16, P.R. Doc. 13, Pl.'s App., Tab 7, at 3.

Although CSUSA neither takes ownership of the steel nor becomes involved in the contracting process, it appears that these sales could not be executed without CSUSA. Thus, because these sales (1) were at least finalized in the U.S. post-

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[19] Corus also argues that because the sales were "agreed to" in the Netherlands before importation, they were EP sales. The definitions of both CEP and EP include the phrase "first sold (or agreed to be sold)." 19 U.S.C. § 1677a(a), (b).

importation, and (2) were "facilitated" by a U.S.-based affiliate, it was understandable that Commerce selected them using the same basis that it used to select CEP sales..

Finally, Corus could point to no distortion caused by this manner of selection. Commerce, while not treating the sales as CEP sales for other purposes, selected the "post-importation" EP sales for review based on a CEP sales date methodology because such sales had earmarks of CEP sales and posed the same difficulty when trying to connect them to earlier entry dates. Therefore, Commerce's selection of Corus's "post-importation" EP sales on the same basis as its CEP sales is reasonable.

CONCLUSION

Because Commerce's use of zeroing, and its methodology for selecting sales used in the margin calculation are reasonable and in accordance with the law, Corus's Motion for Judgment on the Agency Record is denied, and Commerce's Final Results are sustained.

/s/ Jane A. Restani
JANE A. RESTANI
CHIEF JUDGE

Dated: New York, New York
This 19th day of July, 2005

APPENDIX C

DEPARTMENT OF COMMERCE

International Trade Administration

[A-421-807]

Certain Hot-Rolled Carbon Steel Flat Products From the Netherlands; Amended Final Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of amended final results of antidumping duty administrative review.

SUMMARY: On June 16, 2004, the Department of Commerce (the Department) published in the Federal Register its notice of final results of the antidumping duty administrative review of certain hot-rolled carbon steel flat products from the Netherlands for the period May 3, 2001 through October 31, 2002. *See Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Final Results of Antidumping Duty Administrative Review*, 69 FR 33630 (June 16, 2004). On June 15, 2004, in accordance with 19 CFR 351.224(c)(2), we received a timely-filed ministerial error allegation from respondent, Corus Staal BV (Corus).[1] We did not receive ministerial error allegations from petitioners.[2] Based on our analysis of Corus' ministerial error allegation, the Department has revised the antidumping duty margin for Corus. Accordingly, we are amending our final results.

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[1] We released disclosure documents to respondent and petitioners on June 9, 2004, thereby making June 14, 2004 the deadline for submitting ministerial error comments. However, in response to a request by respondent, we extended the deadline by one day, until June 15, 2004.

[2] Petitioners are United States Steel Corporation and Nucor Corporation.

EFFECTIVE DATE: July 22, 2004.

FOR FURTHER INFORMATION CONTACT:

Deborah Scott or Robert James, Antidumping and Countervailing Duty Enforcement Group III, Office Eight, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230, telephone: (202) 482-2657 or (202) 482-0649, respectively.

SUPPLEMENTARY INFORMATION:

Scope of the Review

For purposes of this order, the products covered are certain hot-rolled carbon steel flat products of a rectangular shape, of a width of 0.5 inch or greater, neither clad, plated, nor coated with metal and whether or not painted, varnished, or coated with plastics or other non-metallic substances, in coils (whether or not in successively superimposed layers), regardless of thickness, and in straight lengths, of a thickness of less than 4.75 mm and of a width measuring at least 10 times the thickness. Universal mill plate (*i.e.*, flat-rolled products rolled on four faces or in a closed box pass, of a width exceeding 150 mm, but not exceeding 1250 mm, and of a thickness of not less than 4.0 mm, not in coils and without patterns in relief) of a thickness not less than 4.0 mm is not included within the scope of this review. Specifically included within the scope of this order are vacuum degassed, fully stabilized (commonly referred to as interstitial-free (IF)) steels, high strength low alloy (HSLA) steels, and the substrate for motor lamination steels. IF steels are recognized as low carbon steels with micro-alloying levels of elements such as titanium or niobium (also commonly referred to as columbium), or both, added to stabilize carbon and nitrogen elements. HSLA steels are recognized as steels with micro-alloying levels of elements such as chromium, copper, niobium, vanadium, and molybdenum. The substrate for

motor lamination steels contains micro-alloying levels of elements such as silicon and aluminum.

Steel products to be included in the scope of this order, regardless of definitions in the Harmonized Tariff Schedule of the United States (HTS), are products in which: (i) Iron predominates, by weight, over each of the other contained elements; (ii) the carbon content is 2 percent or less, by weight; and (iii) none of the elements listed below exceeds the quantity, by weight, respectively indicated:

1.80 percent of manganese, or
2.25 percent of silicon, or
1.00 percent of copper, or
0.50 percent of aluminum, or
1.25 percent of chromium, or
0.30 percent of cobalt, or
0.40 percent of lead, or
1.25 percent of nickel, or
0.30 percent of tungsten, or
0.10 percent of molybdenum, or
0.10 percent of niobium, or
0.15 percent of vanadium, or
0.15 percent of zirconium.

All products that meet the physical and chemical description provided above are within the scope of this order unless otherwise excluded. The following products, by way of example, are outside or specifically excluded from the scope of this order:

• Alloy hot-rolled steel products in which at least one of the chemical elements exceeds those listed above (including, e.g., ASTM specifications A543, A387, A514, A517, A506).

• Society of Automotive Engineers (SAE)/American Iron and Steel Institute (AISI) grades of series 2300 and higher. sbull; Ball bearings steels, as defined in the HTS. sbull; Tool steels, as defined in the HTS.

• Silico-manganese (as defined in the HTS) or silicon electrical steel with a silicon level exceeding 2.25 percent. sbull; ASTM specifications A710 and A736. sbull; USS Abrasion-resistant steels (USS AR 400, USS AR 500).

• All products (proprietary or otherwise) based on an alloy ASTM specification (sample specifications: ASTM A506, A507).

• Non-rectangular shapes, not in coils, which are the result of having been processed by cutting or stamping and which have assumed the character of articles or products classified outside chapter 72 of the HTS.

The merchandise subject to this order is classified in the HTS at subheadings: 7208.10.15.00, 7208.10.30.00, 7208.10.60.00, 7208.25.30.00, 7208.25.60.00, 7208.26.00.30, 7208.26.00.60, 7208.27.00.30, 7208.27.00.60, 7208.36.00.30, 7208.36.00.60, 7208.37.00.30, 7208.37.00.60, 7208.38.00.15, 7208.38.00.30, 7208.38.00.90, 7208.39.00.15, 7208.39.00.30, 7208.39.00.90, 7208.40.60.30, 7208.40.60.60, 7208.53.00.00, 7208.54.00.00, 7208.90.00.00, 7211.14.00.90, 7211.19.15.00, 7211.19.20.00, 7211.19.30.00, 7211.19.45.00, 7211.19.60.00, 7211.19.75.30, 7211.19.75.60, and 7211.19.75.90. Certain hot-rolled flat-rolled carbon steel flat products covered by this order, including: Vacuum degassed fully stabilized; high strength low alloy; and the substrate for motor lamination steel may also enter under the following tariff numbers: 7225.11.00.00, 7225.19.00.00, 7225.30.30.50, 7225.30.70.00, 7225.40.70.00, 7225.99.00.90, 7226.11.10.00, 7226.11.90.30, 7226.11.90.60, 7226.19.10.00, 7226.19.90.00, 7226.91.50.00, 7226.91.70.00, 7226.91.80.00, and 7226.99.00.00. Subject merchandise may also enter under 7210.70.30.00, 7210.90.90.00, 7211.14.00.30, 7212.40.10.00, 7212.40.50.00, and 7212.50.00.00. Although the HTS subheadings are provided for convenience and U.S. Customs purposes, the written description of the scope of this order is dispositive.

Amended Final Results of Review

On June 15, 2004, Corus timely filed, pursuant to 19 CFR 351.224(c)(2), an allegation that the Department made one ministerial error in its final results. For EP transactions with a sale date (*i.e.*, invoice date) prior to importation, Corus states the Department used date of entry to select the transactions used in its analysis. Corus alleges that for these transactions, the Department erred by using the entry date for purposes of currency conversions rather than date of sale. Therefore, Corus requests that the Department correct this error by using date of sale for currency conversions for those EP transactions with a sale date prior to importation. Petitioners submitted no rebuttal comments to this ministerial error allegation.

We agree with Corus. The Tariff Act of 1930, as amended (the Tariff Act), as well as the Department's regulations, define a ministerial error as one involving "addition, subtraction, or other arithmetic function, clerical errors resulting from inaccurate copying, duplication, or the like, and any other type of unintentional error which the Secretary considers ministerial." *See* section 751(h) of the Tariff Act and 19 CFR 351.224(f). The Department's regulations also provide that "[i]n an antidumping proceeding, the Secretary will convert foreign currencies into United States dollars using the rate of exchange on the date of sale of the subject merchandise." *See* 19 CFR 351.415(a). For purposes of our analysis, in utilizing entry date to select EP sales with a sale date prior to importation, we unintentionally set date of sale equal to entry date for those transactions. Because invoice date should have been used as date of sale for those transactions for purposes of currency conversions, we have corrected this inadvertent error by using date of sale for purposes of currency conversions. See lines 2601, 2608, and 2901 of the amended U.S. sales program.

In accordance with 19 CFR 351.224(e), we have amended the final results of the 2001-2002 antidumping duty administrative review of certain hot-rolled carbon steel flat products from the Netherlands, as noted above. As a result of this correction, Corus' margin decreased from 4.94 percent to 4.80 percent *ad valorem*.

The Department shall determine and U.S. Customs and Border Protection (CBP) shall assess antidumping duties on all appropriate entries. As a result of the Court of International Trade's decision in *Corus Staal BV et al. v. United States*, Consol. Court No. 02-00003, Slip Op. 03-127 (CIT September 29, 2003), we will not assess duties on merchandise that entered between October 30, 2001 and November 28, 2001, inclusive. For more information, *see Certain Hot-Rolled Carbon Steel Flat Products From The Netherlands: Notice of Final Court Decision and Suspension of Liquidation*, 68 FR 60912 (October 24, 2003). Thus, in accordance with 19 CFR 351.212(b)(1), we will calculate an importer-specific *ad valorem* assessment rate for merchandise based on the ratio of the total amount of antidumping duties calculated for the examined sales made during the POR to the total customs value of the sales used to calculate those duties. Where the importer-specific assessment rate is above *de minimis*, we will instruct CBP to assess duties on all appropriate entries of subject merchandise by that importer. This rate will be assessed uniformly on all entries of that particular importer made during the periods May 3, 2001 through October 29, 2001 and November 29, 2001 through October 31, 2002. The Department will issue appropriate assessment instructions directly to CBP within 15 days of publication of the final results of review.

The amended cash deposit requirement is effective for all shipments of subject merchandise manufactured by Corus entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice and shall remain

in effect until publication of the final results of the next administrative review.

These amended final results are issued and published in accordance with section 751(h) of the Tariff Act and 19 CFR 351.224.

Dated: July 14, 2004.

James J. Jochum,
Assistant Secretary for Import Administration.

[FR Doc. 04-16743 Filed 7-21-04; 8:45 am]

APPENDIX D

DEPARTMENT OF COMMERCE

International Trade Administration

[A-421-807]

Certain Hot-Rolled Carbon Steel Flat Products From the Netherlands; Final Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of final results of antidumping duty administrative review of certain hot-rolled carbon steel flat products from the Netherlands.

SUMMARY: On December 8, 2003, the Department of Commerce (the Department) published the preliminary results of the administrative review of the antidumping duty order on certain hot-rolled carbon steel flat products from the Netherlands. *See Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Preliminary Results of Antidumping Duty Administrative Review*, 68 FR 68341 (December 8, 2003) (*Preliminary Results*). This review covers imports of subject merchandise from Corus Staal BV (Corus Staal) to the United States during the period May 3, 2001 to October 31, 2002. Based on our analysis of the comments received, we have made changes to the margin calculation. Therefore, the final results differ from the preliminary results. The final weighted-average dumping margin for the reviewed firm is listed below in the section entitled "Final Results of Review."

DATES: *Effective Date*: July 16, 2004.

FOR FURTHER INFORMATION CONTACT:

Deborah Scott or Robert James, AD/CVD Enforcement, Group III, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and

Constitution Avenue, NW., Washington, DC 20230, telephone: (202) 482-2657 or (202) 482- 0649, respectively.

SUPPLEMENTARY INFORMATION:

Background

On December 8, 2003, the Department published in the Federal Register the *Preliminary Results* of the administrative review of the antidumping duty order on certain hot-rolled carbon steel flat products from the Netherlands for the period May 3, 2001 to October 31, 2002. In response to the Department's invitation to comment on the preliminary results of this review, Corus (respondent) and United States Steel Corporation (USSC) and Nucor Corporation (Nucor) (collectively, petitioners) filed their case briefs on January 14, 2004. Corus, USSC, and Nucor submitted rebuttal briefs on January 23, 2004. On February 12, 2004, we published in the Federal Register our notice of the extension of time limits for this review. *See Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Antidumping Duty Administrative Review; Extension of Time Limit*, 69 FR 6939 (February 12, 2004). This extension established the deadline for this final as June 5, 2004. Since this date falls on a Saturday, i.e., a non-business day, the signature date for this final is June 7, 2004.

Period of Review

The period of review (POR) is May 3, 2001 to October 31, 2002.

Scope of the Review

For purposes of this order, the products covered are certain hot-rolled carbon steel flat products of a rectangular shape, of a width of 0.5 inch or greater, neither clad, plated, nor coated with metal and whether or not painted, varnished, or coated with plastics or other non-metallic substances, in coils (whether or not in successively superimposed layers), regardless of thickness, and in straight lengths, of a thickness of less

than 4.75 mm and of a width measuring at least 10 times the thickness. Universal mill plate (i.e., flat-rolled products rolled on four faces or in a closed box pass, of a width exceeding 150 mm, but not exceeding 1250 mm, and of a thickness of not less than 4.0 mm, not in coils and without patterns in relief) of a thickness not less than 4.0 mm is not included within the scope of this review. Specifically included within the scope of this order are vacuum degassed, fully stabilized (commonly referred to as interstitial-free (IF)) steels, high strength low alloy (HSLA) steels, and the substrate for motor lamination steels. IF steels are recognized as low carbon steels with micro-alloying levels of elements such as titanium or niobium (also commonly referred to as columbium), or both, added to stabilize carbon and nitrogen elements. HSLA steels are recognized as steels with micro-alloying levels of elements such as chromium, copper, niobium, vanadium, and molybdenum. The substrate for motor lamination steels contains micro-alloying levels of elements such silicon and aluminum.

Steel products to be included in the scope of this order, regardless of definitions in the Harmonized Tariff Schedule of the United States (HTS), are products in which: (i) Iron predominates, by weight, over each of the other contained elements; (ii) the carbon content is 2 percent or less, by weight; and (iii) none of the elements listed below exceeds the quantity, by weight, respectively indicated:

1.80 percent of manganese, or
2.25 percent of silicon, or
1.00 percent of copper, or
0.50 percent of aluminum, or
1.25 percent of chromium, or
0.30 percent of cobalt, or
0.40 percent of lead, or
1.25 percent of nickel, or
0.30 percent of tungsten, or

0.10 percent of molybdenum, or
0.10 percent of niobium, or
0.15 percent of vanadium, or
0.15 percent of zirconium.

All products that meet the physical and chemical description provided above are within the scope of this order unless otherwise excluded. The following products, by way of example, are outside or specifically excluded from the scope of this order:

• Alloy hot-rolled steel products in which at least one of the chemical elements exceeds those listed above (including, *e.g.*, ASTM specifications A543, A387, A514, A517, A506).

• Society of Automotive Engineers (SAE)/American Iron and Steel Institute (AISI) grades of series 2300 and higher.

• Ball bearings steels, as defined in the HTS.

• Tool steels, as defined in the HTS.

• Silico-manganese (as defined in the HTS) or silicon electrical steel with a silicon level exceeding 2.25 percent.

• ASTM specifications A710 and A736.

• USS Abrasion-resistant steels (USS AR 400, USS AR 500).

• All products (proprietary or otherwise) based on an alloy ASTM specification (sample specifications: ASTM A506, A507).

• Non-rectangular shapes, not in coils, which are the result of having been processed by cutting or stamping and which have assumed the character of articles or products classified outside chapter 72 of the HTS.

The merchandise subject to this order is classified in the HTS at subheadings: 7208.10.15.00, 7208.10.30.00, 7208.10.60.00, 7208.25.30.00, 7208.25.60.00, 7208.26.00.30,

7208.26.00.60, 7208.27.00.30, 7208.27.00.60, 7208.36.00.30, 7208.36.00.60, 7208.37.00.30, 7208.37.00.60, 7208.38.00.15, 7208.38.00.30, 7208.38.00.90, 7208.39.00.15, 7208.39.00.30, 7208.39.00.90, 7208.40.60.30, 7208.40.60.60, 7208.53.00.00, 7208.54.00.00, 7208.90.00.00, 7211.14.00.90, 7211.19.15.00, 7211.19.20.00, 7211.19.30.00, 7211.19.45.00, 7211.19.60.00, 7211.19.75.30, 7211.19.75.60, and 7211.19.75.90. Certain hot-rolled flat-rolled carbon steel flat products covered by this order, including: vacuum degassed fully stabilized; high strength low alloy; and the substrate for motor lamination steel may also enter under the following tariff numbers: 7225.11.00.00, 7225.19.00.00, 7225.30.30.50, 7225.30.70.00, 7225.40.70.00, 7225.99.00.90, 7226.11.10.00, 7226.11.90.30, 7226.11.90.60, 7226.19.10.00, 7226.19.90.00, 7226.91.50.00, 7226.91.70.00, 7226.91.80.00, and 7226.99.00.00. Subject merchandise may also enter under 7210.70.30.00, 7210.90.90.00, 7211.14.00.30, 7212.40.10.00, 7212.40.50.00, and 7212.50.00.00. Although the HTS subheadings are provided for convenience and U.S. Customs purposes, the written description of the scope of this order is dispositive.

Analysis of Comments Received

All issues raised in the case and rebuttal briefs by parties to this administrative review are addressed in the "Issues and Decision Memorandum" (Decision Memorandum) from Joseph A. Spetrini, Deputy Assistant Secretary for Import Administration, to James J. Jochum, Assistant Secretary for Import Administration, dated June 7, 2004, which is hereby adopted by this notice. A list of the issues which parties have raised and to which we have responded, all of which are in the Decision Memorandum, is attached to this notice as an appendix. Parties can find a complete discussion of all issues raised in this review and the corresponding recommendations in this public memorandum, which is on file in the Central Records Unit, room B-099, of the main Department building. In addition, a complete version of the Decision Memorandum

can be accessed directly via the Internet at *http://www.ia.ita.doc.gov*. The paper copy and electronic version of the Decision Memorandum are identical in content.

Changes Since the Preliminary Results

Based on our analysis of the comments received, we have made the following changes to the margin calculation:

• We have modified the weighting factor for the quality field in our model match hierarchy so that it consists of two digits rather than one.

• We have excluded entries which occurred between October 30, 2001 and November 28, 2001, inclusive ("gap period"), from the calculation of the dumping margin. We have also revised the calculation of the assessment rate to exclude the gap period entries from the numerator.[1]

• We have amended our margin calculation program so that for sales which occurred prior to importation, the entry date was used to define the transactions used in our analysis.

• We have revised the adjustment made to the cost of manufacturing for the unexplained difference found in Corus' cost reconciliation. The difference in the reconciliation was due to both a change in finished goods inventory and a small unexplained difference in the cost reconciliation. We have continued to adjust the cost of manufacture for the change in finished goods inventory but have no longer adjusted for the minor unexplained difference in the cost reconciliation.

• We have amended our calculation of variable costs of manufacture (VCOMH/U) to reflect the revised startup costs (RSTARTUP).

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[1] We note that gap period entries had already been excluded from the denominator of the assessment rate for the preliminary results, and continue to be excluded from the denominator of the assessment rate for the final results.

These changes are discussed in the relevant sections of the Decision Memorandum.

Final Results of Review

We determine that the following weighted-average percentage margin exists for the period May 3, 2001 to October 31, 2002:

Manufacturer/exporter	Weighted average percentage margin
Corus	4.94

Assessment

The Department shall determine and U.S. Customs and Border Protection (CBP) shall assess antidumping duties on all appropriate entries. As a result of the Court of International Trade's decision in *Corus Staal BV et al. v. United States*, Consol. Court No. 02- 00003, Slip Op. 03-127 (CIT September 29, 2003), we will not assess duties on merchandise that entered between October 30, 2001 and November 28, 2001, inclusive. For more information, *see Certain Hot-Rolled Carbon Steel Flat Products From The Netherlands: Notice of Final Court Decision and Suspension of Liquidation*, 68 FR 60912 (October 24, 2003). Thus, in accordance with 19 CFR 351.212(b)(1), we will calculate an importer-specific *ad valorem* assessment rate for merchandise based on the ratio of the total amount of antidumping duties calculated for the examined sales made during the POR[2] to the total

[2] Since we have not included entries which occurred between October 30, 2001 and November 28, 2001 in the calculation of the dumping margin (*see* "Changes Since the Preliminary Results"), the "total amount of antidumping duties calculated for the examined sales made during the

customs value of the sales used to calculate those duties. Where the importer-specific assessment rate is above *de minimis*, we will instruct CBP to assess duties on all appropriate entries of subject merchandise by that importer. This rate will be assessed uniformly on all entries of that particular importer made during the periods May 3, 2001 through October 29, 2001 and November 29, 2001 through October 31, 2002. The Department will issue appropriate assessment instructions directly to CBP within 15 days of publication of the final results of review.

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of these final results for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of these final results of administrative review, as provided by section 751(a)(1) of the Tariff Act: (1) The cash deposit rate for the reviewed company will be the rate listed above; (2) if the exporter is not a firm covered in this review, a prior review, or the original less than fair value (LTFV) investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and (3) the cash deposit rate for all other manufacturers or exporters will continue to be the "all others" rate of 2.59 percent, which is the "All Others" rate established in the LTFV investigation. *See Notice of Amended Final Determination of Sales at Less Than Fair Value; Certain Hot-Rolled Carbon Steel Flat Products From The Netherlands*, 66 FR 55637 (November 2, 2001). These deposit requirements, when imposed, shall remain in effect until publication of the final results of the next administrative review.

POR" does not include sales of merchandise which entered during that same period.

Notification to Interested Parties

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of the antidumping duties occurred and the subsequent assessment of double antidumping duties.

This notice also serves as a reminder to parties subject to administrative protective orders (APOs) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305, that continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

This determination is issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Tariff Act.

Dated: June 7, 2004.

James J. Jochum,

Assistant Secretary for Import Administration.

Appendix—Issues in Decision Memorandum

Comment 1. Conventional Hot-Rolled Material vs. Direct Sheet Product

Comment 2. Quality Code

Comment 3. Treatment of Section 201 Tariffs

Comment 4. Treatment of Non-dumped Sales

Comment 5. Gap Period Entries

Comment 6. Cost of Manufacturing

Comment 7. General Expense Ratio

Comment 8. Variable Cost of Manufacturing

Comment 9. CEP Profit Rate

Comment 10. Use of Sale Date vs. Entry Date to Identify EP Sales

Comment 11. Reporting Period for U.S. Sales

[FR Doc. 04-13495 Filed 6-15-04; 8:45 am]

APPENDIX E

Statutory Citations to be included at end of Corus Appendix

19 U.S.C. § 3533 provides:

Dispute settlement panels and procedures

(a) Review by President

The President shall review annually the WTO panel roster and shall include the panel roster and the list of persons serving on the Appellate Body in the annual report submitted by the President under section 2213(a) of this title.

(b) Qualifications of appointees to panels

The Trade Representative shall—

(1) seek to ensure that persons appointed to the WTO panel roster are well-qualified, and that the roster includes persons with expertise in the subject areas covered by the Uruguay Round Agreements; and

(2) inform the President of persons nominated to the roster by other WTO member countries.

(c) Rules governing conflicts of interest

The Trade Representative shall seek the establishment by the General Council and the Dispute Settlement Body of rules governing conflicts of interest by persons serving on panels and members of the Appellate Body and shall describe, in the annual report submitted under section 3534 of this title, any progress made in establishing such rules.

(d) Notification of disputes

Promptly after a dispute settlement panel is established to consider the consistency of Federal or State law with any of the Uruguay Round Agreements, the Trade Representative shall notify the appropriate congressional committees of—

(1) the nature of the dispute, including the matters set forth in the request for the establishment of the panel, the legal basis of the complaint, and the specific measures, in particular any State or Federal law cited in the request for establishment of the panel;

(2) the identity of the persons serving on the panel; and

(3) whether there was any departure from the rule of consensus with respect to the selection of persons to serve on the panel.

(e) Notice of appeals of panel reports

If an appeal is taken of a report of a panel in a proceeding described in subsection (d) of this section, the Trade Representative shall, promptly after the notice of appeal is filed, notify the appropriate congressional committees of—

(1) the issues under appeal; and

(2) the identity of the persons serving on the Appellate Body who are reviewing the report of the panel.

(f) Actions upon circulation of reports

Promptly after the circulation of a report of a panel or of the Appellate Body to WTO members in a proceeding described in subsection (d) of this section, the Trade Representative shall—

(1) notify the appropriate congressional committees of the report;

(2) in the case of a report of a panel, consult with the appropriate congressional committees concerning the nature of any appeal that may be taken of the report; and

(3) if the report is adverse to the United States, consult with the appropriate congressional committees concerning whether to implement the report's recommendation

and, if so, the manner of such implementation and the period of time needed for such implementation.

(g) Requirements for agency action

(1) Changes in agency regulations or practice

In any case in which a dispute settlement panel or the Appellate Body finds in its report that a regulation or practice of a department or agency of the United States is inconsistent with any of the Uruguay Round Agreements, that regulation or practice may not be amended, rescinded, or otherwise modified in the implementation of such report unless and until—

(A) the appropriate congressional committees have been consulted under subsection (f) of this section;

(B) the Trade Representative has sought advice regarding the modification from relevant private sector advisory committees established under section 2155 of this title;

(C) the head of the relevant department or agency has provided an opportunity for public comment by publishing in the Federal Register the proposed modification and the explanation for the modification;

(D) the Trade Representative has submitted to the appropriate congressional committees a report describing the proposed modification, the reasons for the modification, and a summary of the advice obtained under subparagraph (B) with respect to the modification;

(E) the Trade Representative and the head of the relevant department or agency have consulted with the appropriate congressional committees on the proposed contents of the final rule or other modification; and

(F) the final rule or other modification has been published in the Federal Register.

(2) Effective date of modification

A final rule or other modification to which paragraph (1) applies may not go into effect before the end of the 60-day period beginning on the date on which consultations under paragraph (1)(E) begin, unless the President determines that an earlier effective date is in the national interest.

(3) Vote by congressional committees

During the 60-day period described in paragraph (2), the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate may vote to indicate the agreement or disagreement of the committee with the proposed contents of the final rule or other modification. Any such vote shall not be binding on the department or agency which is implementing the rule or other modification.

(4) Inapplicability to ITC

This subsection does not apply to any regulation or practice of the International Trade Commission.

(h) Consultations regarding review of WTO rules and procedures

Before the review is conducted of the dispute settlement rules and procedures of the WTO that is provided for in the Decision on the Application of the Understanding on Rules and Procedures Governing the Settlement of Disputes, as such decision is set forth in the Ministerial Declarations and Decisions adopted on April 15, 1994, together with the Uruguay Round Agreements, the Trade Representative shall consult with the congressional committees regarding the policy of the United States concerning the review.

19 U.S.C. § 3538 provides:

Administrative action following WTO panel reports

(a) Action by United States International Trade Commission

(1) Advisory report

If a dispute settlement panel finds in an interim report under Article 15 of the Dispute Settlement Understanding, or the Appellate Body finds in a report under Article 17 of that Understanding, that an action by the International Trade Commission in connection with a particular proceeding is not in conformity with the obligations of the United States under the Antidumping Agreement, the Safeguards Agreement, or the Agreement on Subsidies and Countervailing Measures, the Trade Representative may request the Commission to issue an advisory report on whether title VII of the Tariff Act of 1930 [19 U.S.C. 1671 et seq.] or title II of the Trade Act of 1974 [19 U.S.C. 2251 et seq.], as the case may be, permits the Commission to take steps in connection with the particular proceeding that would render its action not inconsistent with the findings of the panel or the Appellate Body concerning those obligations. The Trade Representative shall notify the congressional committees of such request.

(2) Time limits for report

The Commission shall transmit its report under paragraph (1) to the Trade Representative—

(A) in the case of an interim report described in paragraph (1), within 30 calendar days after the Trade Representative requests the report; and

(B) in the case of a report of the Appellate Body, within 21 calendar days after the Trade Representative requests the report.

(3) Consultations on request for Commission determination

If a majority of the Commissioners issues an affirmative report under paragraph (1), the Trade Representative shall consult with the congressional committees concerning the matter.

(4) Commission determination

Notwithstanding any provision of the Tariff Act of 1930 [19 U.S.C. 1202 et seq.] or title II of the Trade Act of 1974 [19 U.S.C. 2251 et seq.], if a majority of the Commissioners issues an affirmative report under paragraph (1), the Commission, upon the written request of the Trade Representative, shall issue a determination in connection with the particular proceeding that would render the Commission's action described in paragraph (1) not inconsistent with the findings of the panel or Appellate Body. The Commission shall issue its determination not later than 120 days after the request from the Trade Representative is made.

(5) Consultations on implementation of Commission determination

The Trade Representative shall consult with the congressional committees before the Commission's determination under paragraph (4) is implemented.

(6) Revocation of order

If, by virtue of the Commission's determination under paragraph (4), an antidumping or countervailing duty order with respect to some or all of the imports that are subject to the action of the Commission described in paragraph (1) is no longer supported by an affirmative Commission determination under title VII of the Tariff Act of 1930 [19 U.S.C. 1671 et seq.] or this subsection, the Trade Representative may, after consulting with the congressional committees under paragraph (5), direct the administering

authority to revoke the antidumping or countervailing duty order in whole or in part.

(b) Action by administering authority

(1) Consultations with administering authority and congressional committees

Promptly after a report by a dispute settlement panel or the Appellate Body is issued that contains findings that an action by the administering authority in a proceeding under title VII of the Tariff Act of 1930 [19 U.S.C. 1671 et seq.] is not in conformity with the obligations of the United States under the Antidumping Agreement or the Agreement on Subsidies and Countervailing Measures, the Trade Representative shall consult with the administering authority and the congressional committees on the matter.

(2) Determination by administering authority

Notwithstanding any provision of the Tariff Act of 1930 [19 U.S.C. 1202 et seq.], the administering authority shall, within 180 days after receipt of a written request from the Trade Representative, issue a determination in connection with the particular proceeding that would render the administering authority's action described in paragraph (1) not inconsistent with the findings of the panel or the Appellate Body.

(3) Consultations before implementation

Before the administering authority implements any determination under paragraph (2), the Trade Representative shall consult with the administering authority and the congressional committees with respect to such determination.

(4) Implementation of determination

The Trade Representative may, after consulting with the administering authority and the congressional committees under paragraph (3), direct the administering authority to

implement, in whole or in part, the determination made under paragraph (2).

(c) Effects of determinations; notice of implementation

(1) Effects of determinations

Determinations concerning title VII of the Tariff Act of 1930 [19 U.S.C. 1671 et seq.] that are implemented under this section shall apply with respect to unliquidated entries of the subject merchandise (as defined in section 771 of that Act [19 U.S.C. 1677]) that are entered, or withdrawn from warehouse, for consumption on or after—

(A) in the case of a determination by the Commission under subsection (a)(4) of this section, the date on which the Trade Representative directs the administering authority under subsection (a)(6) of this section to revoke an order pursuant to that determination, and

(B) in the case of a determination by the administering authority under subsection (b)(2) of this section, the date on which the Trade Representative directs the administering authority under subsection (b)(4) of this section to implement that determination.

(2) Notice of implementation

(A) The administering authority shall publish in the Federal Register notice of the implementation of any determination made under this section with respect to title VII of the Tariff Act of 1930 [19 U.S.C. 1671 et seq.].

(B) The Trade Representative shall publish in the Federal Register notice of the implementation of any determination made under this section with respect to title II of the Trade Act of 1974 [19 U.S.C. 2251 et seq.].

(d) Opportunity for comment by interested parties

Prior to issuing a determination under this section, the administering authority or the Commission, as the case may be, shall provide interested parties with an opportunity to submit written comments and, in appropriate cases, may hold a hearing, with respect to the determination.

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

05-1600

CORUS STAAL BV,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee,

and

UNITED STATES STEEL CORPORATION,
Defendant-Appellee.

Appeal from the United States Court of International Trade in case no. 04-00316, Chief Judge Jane A. Restani.

PETITION FOR REHEARING EN BANC BY PLAINTIFF-APPELLANT CORUS STAAL BV

RICHARD O. CUNNINGHAM
JOEL D. KAUFMAN
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Counsel for Plaintiff-Appellant
Corus Staal BV

July 28, 2006

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CORUS STAAL BY v US, 05-1600

CERTIFICATE OF INTEREST

Counsel for Plaintiff-Appellant Corus Staal BY certifies the following:

1. The full name of every party or amicus represented by me is:

Corus Staal,

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

None

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

Corus Staal BV is 100% owned by Corus Investment BV, which is 100% owned by Corus Nederland BV (formerly Koninklijke Hoogovens NV), which in turn is 100% owned by Corus Group plc, a publicly owned and traded company on the British stock market.

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

Richard 0. Cunningham, Esq., Alice A. Kipel, Esq., and Joel D. Kaufman, Esq. of the law firm of Steptoe & Johnson LLP, and Troy H. Cribb, Esq., formerly of the law firm of Steptoe & Johnson LLP, represented the Appellant at the Court of International Trade. Mr. Cunningham, Ms. Kipel and Mr. Kaufman, as well as

Jamie B. Beaber, Esq., also of Steptoe & Johnson LLP, are expected to appear in this proceeding.

July 28, 2006

/s/ Joel D. Kaufman
JOEL D. KAUFMAN
STEPTOE & JOHNSON LLP
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Counsel for Plaintiff-Appellant
Corus Staal BV

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Panhandle E. Pipeline Co. v. FERC, 890 F.2d 435 (D.C. Cir. 1989) 1, 7-8

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Second Written Submission of the United States, United States—Section 129(c)(1) of the Uruguay Round Agreements Act WT/DS221, 19 (Mar. 8, 2002), available at http://www.ustr.govrrrade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/Dispute_Settlement_Index_-_Concluded.html 11

United States—Laws Regulations and Methodology for Calculating Dumping Margins, Communication by the United States ¶ 12 (May 30, 2006), updated version available at http://www.wto.orgienglishitratop_e/disp_eicases_eids294_e.htm 6, 10

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STATEMENT OF COUNSEL IN SUPPORT OF REHEARING EN BANC

Based on my professional judgment, I believe that the panel decision in *Corus Staal BV v. United States*, Appeal No. 05-1600, is contrary to the following decisions of the U.S. Supreme Court and the precedents of this and other courts of appeal: *NLRB v. Food Store Employees Union Local 347*, 417 U.S. 1 (1974) ("*Food Store Employees*"); *Panhandle E. Pipeline Co. v. FERQ*, 890 F.2d 435 (D.C. Cir. 1989)("*Panhandle E. Pipeline Co.*"); and *Corus Staal BV v. Dept of Commerce*, 395 F.3d 1343 (Fed. Cir. 2005), *cert. denied*, 126 S. Ct. 1023 (2006) ("*Corus Staal I*").

In addition, based on my professional judgment, I believe this appeal requires an answer to precedent-setting questions that are of exceptional importance because they involve action by the Court in an area that this Court itself has determined to be "the exclusive province" of the Executive Branch:

(1) May the Court ignore the intervening change in zeroing policy by the U.S. Department of Commerce ("Commerce"), without remanding to permit Commerce to determine whether that change in policy, in conjunction with Commerce's ongoing implementation of the decision as to this antidumping proceeding by the World Trade Organization ("WTO") in *US-Zeroing*,[1] will require reversal of the administrative review decision that is the subject of this appeal; and

(2) May the Court reach a decision, without first remanding to the administrative agency, on issues that are the subject of a WTO decision and as to which not only has the United States announced its intention to implement the WTO de-

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[1] Panel Report, *United States—Laws, Regulations and Methodology for Calculating Dumping Margins*, WT/DS294/R (Oct. 31, 2005)("*Panel Report*"), *as amended by* Appellate Body Report, WT/DS294/AB/R (Apr. 18, 2006) ("*US-Zeroing*").

cision in the antidumping proceeding that is before the Court but as to which Commerce has commenced a proceeding to change its practice to conform to that WTO decision.

/s/ Richard O. Cunningham
RICHARD O. CUNNINGHAM
Attorney of Record for
Corus Staal BV

PETITION FOR REHEARING EN BANC

The instant petition for rehearing en banc is submitted on behalf of Corus Staal BV ("Corus"), pursuant to F.R.A.P. 35 and 40 and the parallel Rules of this Court, seeking rehearing en banc of this Court's decision in *Corus Staal BV v. United States*, Appeal No. 05-1600 (entry of judgment dated June 13, 2006) ("Corus Staal II").

I. POINTS OF LAW OR FACT THAT WERE OVERLOOKED OR MISAPPREHENDED,

Corus respectfully submits that the Court misapprehended three key points:

1. The Court either did not consider or misapprehended the fact that Commerce has announced that it will abandon the antidumping margin computation methodology (zeroing in average-to-average price comparisons) on which the antidumping order depends, which order constitutes the sole legal authority for conducting the administrative review that is the subject of this appeal. Such an intervening change in Commerce's interpretation of law requires that this Court remand to Commerce to permit the agency to decide in the first instance the effect of that change on Commerce's decision in the administrative review herein at issue.

2. The Court either misapprehended or did not consider the fact that the aforesaid proposed change in methodology was announced by Commerce as the first step in its im-

plementation of the decision in *US-Zeroing*, which found that the antidumping orders in 15 specific antidumping investigations—including the order that constitutes the authority for the administrative review determination that is the subject of this appeal—were based on a margin calculation methodology that is inconsistent with U.S. obligations under the WTO Agreement on Antidumping. This means that the new computation methodology is intended to be applied to a modification or revocation of the order that provides authority for the administrative review determination challenged herein. Accordingly, pursuant to the rule of law stated in *Food Store Employees*, it is incumbent upon this Court to remand to Commerce to permit the agency to decide in the first instance:

(a) whether application of the new computation methodology to the antidumping investigation upon which this order is based will require a determination that the order is invalid, and

(b) whether, if the order is revoked as invalid, active administrative review determinations made under the authority of that order (including the review determination that is the subject of this appeal) must be revoked.

According to representations made by the United States to the WTO, the effect of the WTO decision in *US-Zeroing* will be the revocation of the order and, upon such revocation, Commerce will have to address the question whether in this review, duties may be assessed pursuant to an order revoked as WTO-inconsistent.

3. The Court either did not consider or misapprehended the fact that the United States has not only committed to the WTO to implement *US-Zeroing* both as to the validity of this antidumping order and as to duty assessment instructions issued with respect to entries of this merchandise, but that it

has also declared its intention to abandon the computation methodology on which the order was based. Thus, this implementation process has reached the point where this Court, pursuant to *Corus Staal I*, must remand to Commerce for resolution of issues that are in the exclusive province of the Executive Branch.

II. ARGUMENT IN SUPPORT OF REHEARING EN BANC

A. The Panel Misapprehended or Ignored the Significance of Commerce's Proposed Change in Zeroing Policy

In its briefs and argumentation to the Panel, Corus presented two arguments. Only one of those arguments is presented as the basis for reconsideration, because the Panel apparently misapprehended or ignored it and focused entirely on the other argument.

This motion for reconsideration does not address the issue of whether, in assessing the reasonableness of Commerce's practice of zeroing in the computation of dumping duties in administrative reviews,[2] the Court should weigh Commerce's justifications for that interpretation against the now-settled view of the WTO that zeroing is inconsistent with the obligations of the United States under the WTO Agreement on Antidumping. Although the WTO Appellate Body has ruled in *US-Zeroing*, as to 16 different U.S. administrative reviews, that the U.S. practice of zeroing in the computation of antidumping duties is impermissible, the Panel appears to have felt bound by its view that this Court's decision in *Corus Staal I* precludes any consideration of the substance of a WTO decision until the United States has completed im-

[2] U.S. courts have consistently held that zeroing is not required by U.S. law, but is at most a reasonable interpretation of law that is within the discretion of Commerce. *See, e.g., Timken Co. v. United States*, 354 F.3d 1334, 1341-42 (Fed. Cir.), *cert. denied*, 543 U.S. 976 (2004).

plementation of that decision.[3] Corus continues to believe that a commitment by the United States to implement a WTO decision, which was given "without conditions" by the United States on May 30, 2006 with regard to the *US-Zeroing* ruling that zeroing in the challenged administrative reviews was WTO-inconsistent, must be considered as "adoption" of the WTO decision within the meaning of *Corus Staal I*,[4] and invites the Court to so hold. However, the focus of this Petition is on the implications for this appeal of Commerce's already-announced decision to abandon the zeroing methodology used in the investigation that gave rise to the antidumping order on which the appealed administrative review determination depends for authority.

B. Commerce's Decision To Abandon the Zeroing Methodology that Produced the Antidumping Order on Which the Authority for the Appealed Administrative Review Rests Requires a Remand

If, during the pendency of an appeal, an agency changes or revises a legal norm or policy pertinent to the issue or issues on appeal, the appellate court is required by law to remand the proceeding to the agency. *See Panhandle E. Pipeline Co.*, 890 F.2d at 438-39.

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[3] In *Corus Staal I*, this Court held that: "We will not attempt to perform duties that fall within the exclusive province of the political branches, and we therefore refuse to overturn Commerce's zeroing practice based on any ruling by the WTO . . . unless and until such ruling has been adopted pursuant to the specified statutory scheme." 395 F.3d at 1349.

[4] *See* Press Release, U.S. Mission to the United Nations, *U.S. Statement at the. WTO Dispute Settlement Body Meeting* (May 30, 2006), *available at* http://www.us-mission.ch/Press2006/0531DSBItml; *see also United States—Laws, Regulations and Methodology in Margins*, Communication by the United States ¶ 12 (May 30, 2006) ("U.S. Comunication"). "Implementation" means "[p]rompt compliance with recommendations or rulings of the DSB." WTO Understanding on Rules and Procedures Governing the Settlement of Disputes, Art. 21, para. 1 ("WTO Dispute Settlement Understanding").

In such circumstance, the appellate court is at liberty neither to evaluate the agency's decision under the agency's "*old* policy" nor to assess on its own how the pending issue would be resolved under the agency's "*new* policy." Rather, the appellate court is "required to remand so that the [agency] may indicate how, if at all, its decision would be affected by its intervening policy change." *Id.* at 439. Indeed, in this respect, the Supreme Court has held that, "[a]ppellate courts ordinarily apply the law in effect at the time of the appellate decision. However, a court reviewing an agency decision following an intervening change of policy by the agency should remand to permit the agency to decide in the first instance whether giving the change retrospective effect will best effectuate the policies underlying the agency's governing act."[5] Moreover, an appellate court should decline to resolve inconsistencies regarding a signaled change in policy by substituting the agency counsel's rationale for that of the agency. *Food Store Employees*, 417 U.S. at 9. "The integrity of the administrative process demands no less than that the [agency], not its legal representative, exercise the discretionary judgment which Congress has entrusted to it." *Id.*

The situation discussed in *Panhandle E. Pipeline* and in *Food Store Employees* is precisely the situation presented here. On March 6, 2006, Commerce announced its intention to abandon the use of zeroing in the average-to-average method of computing antidumping margins in antidumping investigations.[6] This was the method used to determine that an antidumping margin of 2.59% existed for Corus' exports in the investigation. That margin resulted in the order on

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[5] *Food Store Employees*, 417 U.S. at 10; *see also Panhandle E. Pipe Line Co.*, 890 F.2d at 439 n.10; *Nat'l Fuel Gas Supply Corp. v. FERC*, 899 F.2d 1244, 1249 (D.C. Cir. 1990).

[6] *Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation*, 71 Fed. Reg. 11,189 (Dep't Commerce Mar. 6, 2006).

which authority for the conduct of the appealed administrative review rests.[7] It is undisputed that use of a non-zeroed method of price comparison in that investigation would not have yielded a positive dumping margin. Accordingly, the effect of this change in computation policy may be to invalidate the antidumping order and the appealed review, and thus to require the rescission of the appealed review determination and the refund of Corus' cash deposits.

Whether this is in fact the effect of the new Commerce policy depends on the resolution of at least two issues that Commerce, not this Court, must address. As to both of those issues, however, previous Commerce pronouncements indicate that the issue will be resolved in such a manner as to require that the appealed review determination be revoked:

The change in computation olic will require revocation of this antidumping order. As stated above, it is undisputed that a non-zeroed margin computation cannot yield a non-*de minimis* dumping margin in the investigation concerning Corus' imports. Accordingly, this order can be sustained only if, after abandoning the methodology of zeroing in the average-to-average comparison methodology, Commerce applies another zeroed methodology.[8] In conjunction with its May 30, 2006 declaration to the WTO Dispute Settlement Body of intention to implement, without conditions, the *US-Zeroing* decision, the United States circulated a paper setting

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[7] At 2,59%, Corus' margin was barely above the statutory definition of de minimis of 2.0% in investigations. 19 U.S.C. § 1673b(b)(3) (2000).

[8] In a decision predating *U.S.-Zeroing* that is currently being challenged at the WTO, Commerce did change to another zeroed methodology in *Notice of Determination Under Section 129 of the Uruguay Round Agreements Act: Antidumping Measures on Certain Softwood Lumber Products from Canada*, 70 Fed. Reg. 22,636 (Dep't Commerce May 2, 2005).

forth its understanding of that decision.[9] In that paper, the United States stated very clearly its understanding that *US-Zeroing* had adopted a rationale under which zeroing would be found impermissible in any antidumping margin computation methodology.[10] Based upon this interpretation of what is necessary to comply with *US-Zeroing*, Commerce will have to utilize non-zeroed methodologies in antidumping investigations. Consistent with that conclusion, Commerce has already announced the abandonment of the zeroing methodology in order to comply with US-Zeroing. Use of a non-zeroed methodology in the present case will require revocation of the antidumping order.

Revocation of the order in this case will require revocation of the appealed annual. review determination. In a previous WTO dispute settlement proceeding, the United States took a clear position on the question of whether revocation of a U.S. antidumping order (through implementation of an adverse WTO determination) would also require a decision by Commerce as to whether duties may continue to be assessed on imports entered before such order revocation, or whether the invalidity of the order would require the revocation of active review determinations. In such a circumstance, the United States represented, "[i]n any subsequent administrative review, Commerce would need to decide what to do with

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[9] U.S. Communication, *supra* note 4 With minor revisions, the May 30 document informally circulated to the members was submitted to the WTO on June 12, Paragraph 12 was identical in both versions. The May 30 version was submitted to the Court on June 5, 2006, in Corus' Notice of Supplemental Authorities. The June 12 version can be found on the WTO website at http://www.wto.orgjenglish/tratop_eidispu eicaseseids 294e.htm.

[10] *Id.* para. 12. The Court of International Trade has recently recognized that, "[w]hile WTO proceedings are neither binding upon nor dispositive for this court, positions taken by the United States . . . are relevant evidence of facts." *PS Chez Sidney, L.L.C. v. United States Intl Trade Comm'n*, Slip Op. 06-103, at 8 n.10 (CIT July 13, 2006).

entries that took place prior to the date of revocation."[11] Commerce thus "would need to decide" that issue in the administrative review that is the subject of this appeal, and the Court must remand for that purpose.

The point, of course, is not that Commerce is legally bound to resolve these issues in the manner consistent with its representations to the WTO. Rather, the point is that these are clearly—and acknowledged by Commerce to be—issues posed for decision by Commerce as a result of its announced abandonment of the price comparison methodology that resulted in the order in this proceeding. Thus, a remand is required,

C. The Change in Methodology Proposed by Commerce Will Be Applied to the Investigation and Order in this Proceeding

Corus anticipates that the appellees herein may point to the language in Commerce's notice of proposed methodology change stating that the new methodology will be applied in investigations initiated on the basis of petitions received on or after the first day of the month following the publication of the new methodology. Therefore, they will say, this change in policy will not apply to this proceeding. That argument ignores two facts:

First, the final determination of which investigations will be subject to this new methodology is one of the determinations Commerce still must make as part of the current process begun on March 6, 2006.

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[11] Second Written Submission of the United States, United States—Section 129(c)(1) of the Uruguay Round Agreements Act, WT/DS22 ¶ 19, at 7 (Mar. 8, 2002), available at http://www.ustr.gov/Trade_Agreements/MonitoringEnforcement/Dispute_Settlement/WTO/Dispute_Settlementindex-_Concluded.html.

Second, and more importantly, the change of methodology proceeding is the first step in determining what new methodology will be used in bringing the investigation determination and order in this case (along with 14 other U.S. investigations) into compliance with the "as applied" and "as such" decisions rendered in *US-Zeroing*. In such circumstances, as in several prior cases in which the WTO rendered one or more "as applied" decisions as to specific cases, but where the decision also implicated a methodology used by Commerce in most or all cases,[12] Commerce first initiated a Section 123 proceeding[13] to determine the appropriate new methodology, then instituted one or more Section 129 proceedings[14] to apply that new policy to the specific cases that were the subject of the WTO "as applied" decisions. Thus, the policy change announced here will be applied to the investigation results on which the appealed review determination rests.

D. The Panel Misapprehended this Court's Mandate that Implementation of WTO Decisions Must Be Left Exclusively to the Executive Branch

In *Corus Staal I*, this Court said:

> Congress . . . has authorized the United States Trade Representative, an arm of the Executive branch, in consultation with various congressional and executive bodies and agencies, to determine whether or not to

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[12] *See, e.g., Notice of Implementation Under Section 129 of the Uruguay Round Agreements Act: Countervailing Measures Concerning Certain Steel Products from the European Communities*, 68 Fed. Reg. 64,858, 64,858 (Dep't Commerce Nov. 17, 2003) (*citing Notice of Final Modification of Agency Practice Under Section 123 of the Uruguay Round Agreements Act*, 68 Fed, Reg. 37,125 (Dep't Commerce June 23, 2003)).

[13] 19 U.S.C. § 3533(g) (2000).

[14] 19 U.S.C. § 3538(c)(1) (2000).

> implement WTO reports and determinations and, if so implemented, the extent of implementation.
>
> ....
>
> We will not attempt to perform duties that fall within the exclusive province of the political branches . . .[15]

For the same reasons that the courts could not, prior to an implementation decision, intrude upon Commerce's interpretation because of the pendency of the Executive Branch's implementation process, the Court must here defer to the Executive Branch in any continuing legal proceeding whose result would be affected by the decisions made in implementation. In Corus' view, this obligation to defer (by remand to the agency) should be deemed to arise as soon as the United States commits to implement a WTO decision.[16] At that point, in an "as applied" case, the decisions concerning how to bring the measure subject to the WTO decision[17] into compliance with that decision "fall within the exclusive province of the political branches."[18]

The Panel here seemed to be of the view that Corus' argument in this regard turns on the date of *completion* of implementation. While it may be logical, on the facts presented in *Corus Staal I*, that the courts' preclusion from invoking a WTO decision continues until the end of implementation, that logic does not apply to the facts hereto

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[15] 395 F.3d at 1349.

[16] "Implementation" means "[p]rompt compliance with recommendations or rulings of the DSB." WTO Dispute Settlement Understanding, Art. 21, para. 1.

[17] Here, the "measure" as to which the United States has committed to implementation is not merely the antidumping order, but also the "duty assessment instructions related thereto" *Panel Report* para. 2.6. Duty assessment instructions come into play in administrative reviews.

[18] *Corus Staal I*, 395 F.3d at 1149.

presented. Where the implementation involves an adverse "as applied" decision implicating the very antidumping duty order before the Court, there is no logic to maintaining that the obligation to defer (by remand) to the Executive Branch does not begin until the end of implementation. That obligation begins as soon as the implementation commitment is made. By no logic can the Court justify continuing the judicial process and thereby preventing agency action where the Executive agency has gone so far as to propose the manner of implementation.—*i.e.*, abandonment of the zeroing methodology.

III. CONCLUSION

For the foregoing reasons, the Court's decision in Corus Staal II raises the issues that are appropriate for rehearing en bane.

Respectfully submitted,

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ADDENDUM

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

[Filed JUN 13, 2006]

05-1600

CORUS STAAL BV,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee,

and

UNITED STATES STEEL CORPORATION,
Defendant-Appellee.

JUDGMENT

ON APPEAL from the United States Court of International Trade.

IN CASE NOS. 04-00316

This CAUSE having been heard and considered it is ORDERED and ADJUDGED:

AFFIRMED. *See* Fed. Cir. R. 36.

Per Curiam (RADER, *Circuit Judge*, PLAGER, *Senior Circuit Judge*, and LINN, *Circuit Judge*.)

ENTERED BY ORDER OF THE COURT

/s/ Jan Horbaly
JAN HORBAIY, Clerk

CERTIFICATE OF SERVICE

I hereby certify that two copies of Plaintiff-Appellant Corus Staal BV's Petition for Rehearing En Banc were served via hand delivery (or first class mail where indicated by asterisk) on this 28th day of July, 2006, upon the following parties:

*On Behalf of the United States:
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Trial Attorney Civil Division
Commercial Litigation Branch
U.S. Department of Justice
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On Behalf of United States Steel Corporation:
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/s/ Michael T. Gershberg
MICHAEL T. GERSHBERG

APPENDIX G

WORLD TRADE ORGANIZATION

19 February 2004

UNITED STATES–LAWS, REGULATIONS AND METHODOLOGY FOR CALCULATING DUMPING MARGINS ("ZEROING")

Request for the Establishment of a Panel by the European Communities

Revision

The following communication, dated 16 February 2004, from the delegation of the European Commission to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

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1. Consultations

On 12 June 2003 and 8 September 2003, the European Communities requested consultations with the United States of America (the "United States") under Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU"); Article XXII:1 of the General Agreement on Tariffs and Trade 1994 (the "GATT 1994"); and Articles 17.2 and 17.3 of the Agreement on implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "*AD Agreement*") with regard to the laws, regulations and methodologies for calculating dumping margins including zeroing practices[1]. Consultations were held on 17 July 2003 and 6 October 2003. They have allowed a better understanding of the respective positions of the parties, but have not led to a satisfactory resolution of the matter.

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[1] WT/DS294/1 of 19 June 2003 and WT/DS294/1/Add.1 of 15 September 2003.

2. Summary of facts

In anti-dumping proceedings the United States uses the following methodologies to establish the dumping margin.

In original investigations, the United States identifies sub-groups of products within the product under investigation ("averaging groups") on a per model basis as well as on the basis of other criteria such as the level of trade. Within each of the averaging groups, a weighted average export price is established and compared to the corresponding weighted average normal value. The results of these comparisons on an "averaging group" basis are added up to establish the dumping margin of the product under investigation as a whole; however, in this process, any negative margins or amounts of "dumping" resulting from the comparison of weighted average normal values with weighted average export prices on an "averaging group" basis are put at zero. As a result, the United States calculates a margin and amount of dumping in excess of the actual dumping practised by the companies concerned.

In administrative review investigations, the United States determines the margin of dumping on the basis of a comparison of a weighted average normal value for each "averaging group" and individual export prices (the United States does not establish weighted average export prices in administrative review investigations). Here again, when adding up the results of the comparisons to determine the total amount or margin of dumping of the product under investigation, the United States puts at zero any negative amounts of "dumping". As a result, the United States calculates a margin of dumping and collects an amount of anti-dumping duty in excess of the actual dumping practised by the companies concerned. The United States uses this methodology systematically in all reviews including so-called newcomer review investigations (Article 9.5 of the *AD Agreement*), changed circumstances review investigations

(Article 11.2 of the *AD Agreement*) and sunset review investigations (Article 11.3 of the *AD Agreement*).

These calculation methodologies are applied pursuant, in particular, to the following United States laws, regulations, administrative procedures and measures:

— the Tariff Act of 1930, as amended (the "Act"), including the Statement of Administrative Action (the "SAA"), in particular Title VII and sections 731, 751, 771(35)(A), 771(35)(B) and 777(A)(d);

— the implementing regulation[2] of the United States Department of Commerce (the "DOC"), in particular section 351.414(c)(2); and

— the Import Administration Antidumping Manual (1997 edition) (the "IA AD Manual") including the computer program(s) to which it refers.

The calculation methodologies described above were respectively applied in the determinations of dumping by the DOC in the original investigations listed in annex I and in the final results of the anti-dumping administrative review investigations listed in annex II.

3. Claims

3.1 As such claims

The European Communities considers that the above-mentioned United States laws, regulations, administrative procedures, measures and methodologies for determining the dumping margin in original investigations and review investigations are inconsistent with several provisions of the *AD Agreement*, GATT 1994 and the Marrakesh Agreement establishing the World Trade Organization , for the following reasons:

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[2] 19 CFR Section 351.

(a) in original investigations, the United States puts at zero the negative margins or amounts of "dumping" resulting from the comparison of weighted average normal values with weighted average export prices within the averaging groups. As a result, the United States calculates a margin and amount of dumping in excess of the actual dumping practised by the companies concerned. This constitutes a violation of:

- Articles 2.4[3] and 2.4.2[4] of the *AD Agreement* insofar as the comparison made by the United States is inconsistent with those provisions;
- Article 5.8 of the *AD Agreement* insofar as a *de minimis* dumping margin is erroneously determined to be not de minimis;
- Articles 9.1 and 9.3 of the *AD Agreement* insofar as there is as a result the imposition and collection of an anti-dumping duty in excess of the margin or amount of dumping as determined pursuant to Article 2 of the *AD Agreement*;
- Articles 1 and 2.1 of the *AD Agreement* and Articles VI:1 and VI:2 of the GATT 1994 insofar as there is as

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[3] "A fair comparison shall be made between the export price and the normal value ."

[4] "Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison."

a result the imposition and collection of an anti-dumping duty which is inconsistent with the *AD Agreement*; and consequently of

- Article XVI:4 of the Marrakesh Agreement establishing the World Trade Organization and Article 18.4 of the *AD Agreement* insofar as the United States has not taken all necessary steps, of a general or particular character, to ensure the conformity of its laws, regulations and administrative procedures with the provisions of GATT 1994 and the *AD Agreement*.

(b) in review investigations, the United States systematically determines the margin of dumping on the basis of a comparison of a weighted average normal value and individual export prices and puts at zero the negative amounts of "dumping". As a result, the United States calculates a margin of dumping and collects an amount of anti-dumping duty in excess of the actual dumping practised by the companies concerned. This constitutes a violation of:

- Articles 2.4 and 2.4.2 of the *AD Agreement*[5] insofar as the comparison made by the United States is in consistent with those provisions;

- Articles 9.1 and 9.3 of the *AD Agreement* insofar as there is as a result the imposition and collection of an anti-dumping duty in excess of the margin of dumping determined pursuant to Article 2 of the *AD Agreement*;

- Articles 9.5 and 11 (including Articles 11.2 and 11.3) of the *AD Agreement* insofar as the determinations of dumping in review investigations contemplated by these provisions are not made in compliance with Articles 2.4 and 2.4.2 of the *AD Agreement*;

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[5] See footnotes 3 and 4.

- Articles 1 and 2.1 of the *AD Agreement* and Articles VI:1 and VI:2 of the GATT 1994 insofar as there is as a result the imposition and collection of an anti-dumping duty which is inconsistent with the *AD Agreement*; and consequently of

- Article XVI:4 of the Marrakesh Agreement establishing the World Trade Organization and Article 18.4 of the *AD Agreement* insofar as the United States has not taken all necessary steps, of a general or particular character, to ensure the conformity of its laws, regulations and administrative procedures with the provisions of GATT 1994 and the *AD Agreement*.

3.2 <u>As applied claims</u>

In the specific anti-dumping proceedings annexed to the present request, the United States applied the methodologies and the laws, regulations, administrative procedures and measures described under point 2 above. In consequence, the European Communities considers that the determinations of dumping by DOC, the determinations of injury by the United States International Trade Commission, the imposition of definitive duties in the original investigations and the outcome of the administrative review investigations as detailed in the annexes are inconsistent with the *AD Agreement*, GATT 1994 and the Marrakesh Agreement establishing the World Trade Organization as follows:

(a) in the original investigations:

- Articles 1, 2.1, 2.4, 2.4.2, 5.8, 9.1 and 9.3 of the *AD Agreement* and Articles VI:1 and VI:2 of the GATT 1994, for the reasons set out under point 3.1(a) above;

- Article 3, including Articles 3.1, 3.2 and 3.5, of the *AD Agreement* insofar as the volume of "dumped imports" for the injury and causality determinations is determined on the basis of margins of dumping in

excess of the actual margin of dumping of the companies concerned, with the result that imports from certain companies which should be excluded because of *de minimis* dumping margins are erroneously included in the "dumped imports"; and consequently

- Article XVI:4 of the Marrakesh Agreement establishing the World Trade Organization and Article 18.4 of the *AD Agreement*, for the reasons set out under point 3.1(a) above.

(b) in the administrative review investigations: Articles 1, 2.1 2.4, 2.4.2, 9.1, 9.3, and 11 (including Article 11.2) of the *AD Agreement* and Articles VI:1 and VI:2 of the GATT 1994, and consequently Article XVI:4 of the Marrakesh Agreement establishing the World Trade Organization and Article 18.4 of the *AD Agreement*, for the reasons set out under point 3.1(b) above.

4. Request

The European Communities hereby respectfully requests that a panel be established, with the standard terms of reference, by the Dispute Settlement Body pursuant to Articles 4.7 and 6 of the DSU, Article XXIII of GATT 1994, and Article 17.4 the *AD Agreement*. The European Communities asks that this request be placed on the agenda of the meeting of the Dispute Settlement Body on 17 February 2004.

ANNEX I
IMPOSITION OF ANTI-DUMPING DUTY

Product	MS	DOC Case Number	DOC Final Determination	ITC Case Number	ITC Determination	AD Order
1. Certain hot-rolled carbon steel	NL	A-421-807	66 FR 50408, October 3, 2001 (amended: 66 FR 55637, November 2, 2001)	A-903	November 2001	66 FR 59565, November 29, 2001
2. Stainless steel bar	F	A-427-820	67 FR 3143, January 23, 2002	A-913	February 2002	67 FR 10385, March 7, 2002
3. Stainless steel bar	G	A-428-830	67 FR 3159, January 23, 2002 (amended: 67 FR 10382, March 7, 2002)	A-914	February 2002	67 FR 10382, March 7, 2002
4. Stainless steel bar	I	A-475-829	67 FR 3155, January 23, 2002 (amended: 67 FR 8228, February 22, 2002)	A-915	February 2002	67 FR 10384, March 7, 2002
5. Stainless steel bar	UK	A-412-822	67 FR 3146, January 23, 2002	A-918	February 2002	67 FR 10381, March 7, 2002
6. Stainless Steel Wire Rod	SW	A-401-806	63 FR40449, July 29,1998	A-774	September 1998	63 FR49329, September 15, 1998
7. Stainless Steel Wire Rod	E	A-469-807	63 FR40391, July 29,1998	A-773	September 1998	63 FR 49330, September 15, 1998
8. Stainless Steel Wire Rod	I	A-475-820	63 FR40422, July 29,1998	A-770	September 1998	63 FR 49327, September 15, 1998
9.Certain Stainless Steel Plate in Coils	B	A-423-808	64 FR15476, March 31, 1999	A-788	May 1999	64 FR 27756, May 21, 1999 (amended by 68 FR 20114 April 24, 2003)
10. Stainless Steel Sheet and Strip in Coils	F	A-427-814	64 FR30820, June 8, 1999	A-797	July 1999	64 FR 40562, July 27, 1999
11. Stainless Steel Sheet and Strip in Coils	I	A-475-824	64 FR30750, June 8, 1999	A-799	July 1999	64 FR 40567, July 27, 1999
12. Stainless Steel Sheet and Strip in Coils	UK	A-412-818	64 FR30688, June 8,1999	A-804	July 1999	64 FR 40555, July 27,1999
13. Certain Cut-to-Length Carbon-Quality Steel Plate	F	A-427-816	64 FR73143, December 29,1999	A-816	February 2000	65 FR 6585, February 10, 2000
14. Certain Cut-to-Length Carbon-Quality Steel Plate	I	A-475-826	64 FR73234, December 29,1999	A-819	February 2000	65 FR 6585, February 10, 2000

ANNEX I IMPOSITION OF ANTI-DUMPING DUTY						
Product	**MS**	**DOC Case Number**	**DOC Final Determination**	**ITC Case Number**	**ITC Determination**	**AD Order**
15. Certain Pasta	I	A-475-818	61 FR30326, June 14, 1996 (amended by 66 FR65889, December 21,2001)	A-734	July 1996	61 FR38547 July 24, 1996

United States—Anti-Dumping Duties on Imports of Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands

Specific Case No. 1

The measure

This case concerns the imposition of anti-dumping duties on Certain Hot-Rolled Carbon Steel Flat products from the Netherlands (US case number A-421-807, 66 FR 59565 of 29 November 2001). The rate of the *ad valorem* anti-dumping duty was 2.59% for Corus Staal BV and all others.

Dumping margin without zeroing

DOC calculated a dumping margin of 2.59% while without the zeroing methodology (i.e. with the negative unit margins included), the dumping margin would have been [– ..%] (negative) and the case would have been terminated.

United States—Anti-Dumping Duties on Imports of Stainless Steel Bar from France

Specific Case No. 2

The measure

This case concerns the imposition of anti-dumping duties on Stainless Steel Bar from France (US case number A-427-820, 67 FR 10385 of 7 March 2002). The rates of the *ad valorem* anti-dumping duty were 71.83% for Aubert & Duval S.A, 3.90% for Ugine-Savoie Imphy and all others.

Dumping margin without zeroing

DOC calculated a dumping margin of 3.90% for Ugine-Savoie Imphy SA while without the zeroing methodology (i.e. with the negative unit margins included), the dumping margin would have been [- ..%] (negative) and the case would have been terminated with respect to this exporter.

United States—Anti-Dumping Duties on Imports of Stainless Steel Bar from Germany

Specific Case No. 3

The measure

This case concerns the imposition of anti-dumping duties on Stainless Steel Bar from Germany (US case number A-428-830, 67 FR 10382 of 7 March 2002). The rates of the ad valorem anti-dumping duty were 13.63% for BGH, 4.17% for Einsal, 15.40% for EWK, 32.32% for KEP and 16.96% for all others.

Dumping margin without zeroing

DOC calculated a dumping margin:

— of 13.63% for BGH. Without the zeroing methodology (i.e. with the negative unit margins included), the dumping margin would have been [..%] (lower).

— of 4.17% for Einsal. Without the zeroing methodology, the dumping margin would have been of [..%] (*de minimis*) and the case would have been terminated with respect to this exporter.

— of 15.40% for EWK. Without the zeroing methodology the dumping margin would have been [..%] (lower).

— of 32.32% for KEP. Without the zeroing methodology the dumping margin would have been [..%] (lower).

United States—Anti-Dumping Duties on Imports of Stainless Steel Bar from Italy

Specific Case No. 4

The measure

This case concerns the imposition of anti-dumping duties on Stainless Steel Bar from Italy (US case number A-475-

829, 67 FR 10384 of 7 March 2002). The rates of the *ad valorem* anti-dumping duty were 2.50% for Acciaierie Valbruna Srl/Acciaierie Bolzano D.p.A, 7.07% for Acciaiera Foroni SpA, 3.83% for Rodacciai S.p.A, 33% for Cogne Acciai Speciali Srl and 3.81% for all others.

Dumping margin without zeroing

DOC calculated a dumping margin:

— of 2.50% for Acciaierie Valbruna Srl/Acciaierie Bolzano S.p.A. Without the zeroing methodology (i.e. with the negative unit margins included), the dumping margin would have been [-..%] (negative) and the case would have been terminated with respect to this exporter.

— of 7.07% for Acciaiera Foroni Spa. Without the zeroing methodology the dumping margin would have been [..%] (lower).

— of 3.83% for Rodacciai SpA. Without the zeroing methodology the dumping margin would have been [...%] (lower).

United States—Anti-Dumping Duties on Imports of Stainless Steel Bar from the United Kingdom

Specific Case No. 5

The measure

This case concerns the imposition of anti-dumping duties on Stainless Steel Bar from the United Kingdom (US case number A-412-822, 67 FR 10381 of 7 March 2002). The rates of the ad valorem anti-dumping duty were 4.48% for Corus Engineering Steels, Ltd, 125.77% for Crownridge Stainless Steel, Ltd/Valkia Ltd and Firth Rixson Special Steels, Ltd and 4.48% for all others.

Dumping margin without zeroing

DOC calculated a dumping margin of 4.48% for Corus Engineering Steels, Ltd while without the zeroing methodology (i.e. with the negative unit margins included), the dumping margin would have been [- ...%] (negative) and the case would have been terminated with respect to this exporter.

United States—Anti-Dumping Duties on Imports of Stainless Steel Wire Rod from Sweden

Specific Case No. 6

The measure

This case concerns the imposition of anti-dumping duties on Stainless Steel Wire Rod from Sweden (US case number A-401-806, 63 FR 49329 of 15 September 1998). The rate of the *ad valorem* anti-dumping duty was 5.71% for Fagersta Stainless AB and all others.

Dumping margin without zeroing

DOC calculated a dumping margin of 5.71% for Fagersta Stainless AB while without the zeroing methodology (i.e. with the negative unit margins included), the dumping margin would have been [-...%] (negative) and the case would have been terminated with respect to this exporter.

United States—Anti-Dumping Duties on Imports of Stainless Steel Wire Rod from Spain

Specific Case No. 7

The measure

This case concerns the imposition of anti-dumping duties on Stainless Steel Wire Rod from Spain (US case number A-469-807, 63 FR 49330 of 15 September 1998). The rate of the ad valorem anti-dumping duty was 4.73% for Roldán SA and all others.

Dumping margin without zeroing

DOC calculated a dumping margin of 4.73% for Roldán SA while without the zeroing methodology (i.e. with the negative unit margins included), the dumping margin would have been [...%] (lower).

United States—Anti-Dumping Duties on Imports of Stainless Steel Wire Rod from Italy

Specific Case No. 8

The measure

This case concerns the imposition of anti-dumping duties on Stainless Steel Wire Rod from Italy (US case number A-475-820, 63 FR 49327 of 15 September 1998). The rate of the ad valorem anti-dumping duty was 12.72% for Cogne Acciai Speciali Srl and all others.

Dumping margin without zeroing

DOC calculated a dumping margin of 12.72% for Cogne Acciai Speciali Srl while without the zeroing methodology (i.e. with the negative unit margins included), the dumping margin would have been [...%] (lower).

United States—Anti-Dumping Duties on Imports of Stainless Steel Plate in Coils from Belgium

Specific Case No. 9

The measure

This case concerns the imposition of anti-dumping duties on Stainless Steel Plate in Coils from Belgium (US case number A-423-808, 64 FR 27756 of 21 May 1999, amended by 68 FR 20114 of 24 April 2003). The rate of the *ad valorem* anti-dumping duty was 3.84% for ALZ and 9.86% for all others.

Dumping margin without zeroing

DOC calculated a dumping margin of 3.84% for ALZ while without the zeroing methodology (i.e. with the negative unit margins included), the dumping margin would have been [..%] (lower).

United States—Anti-Dumping Duties on Imports of Stainless Steel Sheet and Strip in Coils from France

Specific Case No. 10

The measure

This case concerns the imposition of anti-dumping duties on Stainless Steel Sheet and Strip in Coils from France (US case number A-427-814, 64 FR 40562 of 27 July 1999). The rate of the *ad valorem* anti-dumping duty was 9.38% for Usinor and all others.

Dumping margin without zeroing

DOC calculated a dumping margin of 9.38% for Usinor while without the zeroing methodology (i.e. with the negative unit margins included), the dumping margin would have been [...%] (lower).

United States—Anti-Dumping Duties on Imports of Stainless Steel Sheet and Strip in Coils from Italy

Specific Case No. 11

The measure

This case concerns the imposition of anti-dumping duties on Stainless Steel Sheet and Strip in Coils from Italy (US case number A-475-824, 64 FR 40567 of 27 July 1999). The rate of the *ad valorem* anti-dumping duty was 11.23% for Acciai Spaciali Terni SpA and all others.

Dumping margin without zeroing

DOC calculated a dumping margin of 11.23% for Acciai Spaciali Terni SpA while without the zeroing methodology (i.e. with the negative unit margins included), the dumping margin would have been [..%] (lower).

United States—Anti-Dumping Duties on Imports of Stainless Steel Sheet and Strip in Coils from the UK

Specific Case No. 12

The measure

This case concerns the imposition of anti-dumping duties on Stainless Steel Sheet and Strip in Coils from the UK (US case number A-412-818, 64 FR 40555 of 27 July 1999). The rate of the *ad valorem* anti-dumping duty was 14.84% for Avesta Sheffield and all others.

Dumping margin without zeroing

DOC calculated a dumping margin of 14.84% for Avesta Sheffield while without the zeroing methodology (i.e. with the negative unit margins included), the dumping margin would have been [..%] (lower).

United States—Anti-Dumping Duties on Imports of Certain Cut-to-Length Carbon-Quality Steel Plate from France

Specific Case No. 13

The measure

This case concerns the imposition of anti-dumping duties on Certain Cut-to-Length Carbon-Quality Steel Plate from France (US case number A-427-816, 65 FR 6585 of 10 February 2000). The rate of the *ad valorem* anti-dumping duty was 10.41% for Usinor and all others.

Dumping margin without zeroing

DOC calculated a dumping margin of 10.41% for Usinor while without the zeroing methodology (i.e. with the negative unit margins included), the dumping margin would have been [...%] (lower).

United States—Anti-Dumping Duties on Imports of Certain Cut-to-Length Carbon-Quality Steel Plate from Italy

Specific Case No. 14

The measure

This case concerns the imposition of anti-dumping duties on Certain Cut-to-Length Carbon-Quality Steel Plate from Italy (US case number A-475-826, 65 FR 6585 of 10 February 2000). The rate of the *ad valorem* anti-dumping duty was 7.85% for Palini and Bertoli SpA and all others.

Dumping margin without zeroing

DOC calculated a dumping margin of 7.85% for Palini and Bertoli SpA while without the zeroing methodology (i.e. with the negative unit margins included), the dumping margin would have been [..%] (lower).

United States—Anti-Dumping Duties on Imports of Certain Pasta from Italy

Specific Case No. 15

The measure

This case concerns the imposition of anti-dumping duties on Certain Pasta from Italy (US case number A-475-818, 61 FR 38547 of 24 July 1996). The rates of the *ad valorem* anti-dumping duty were 21.34% for Italpasta, 14.78% for La Molisana, 12.41% for Liguori, 18.30% for Pagani and 12.09% for all others.

Dumping margin without zeroing

DOC calculated a dumping margin:

— of 21.34% for Italpasta. Without the zeroing methodology (i.e. with the negative unit margins included), the dumping margin would have been [..%] (lower).

— of 14.78% for La Molisana. Without the zeroing methodology, the dumping margin would have been of [..%] (lower).

— of 12.41% for Liguori. Without the zeroing methodology the dumping margin would have been .[..%] (lower).

— of 18.30% for Pagani. Without the zeroing methodology the dumping margin would have been [..%] (lower).

ANNEX II ADMINISTRATIVE REVIEWS							
Product	MS	No Case	Final Results	Amended Final Results	Company	Dumping Margin	Period covered by the Review
16. Industrial Nitrocellulose	F	A-427-009	66 FR 54213, October 26, 2001		Bergerac NC	3.26%	1 August 99-31 July 00
17. Industrial Nitrocellulose	UK	A-412-803	67 FR 77747, December 19, 2002		Imperial Chemical Industries	3.06%	1 July 00-30 June 01
18. *Stainless steel plate in* coils	B	A-423-808	67 FR 64352, October 18, 2002		ALZ NV & TrefilARBED (affiliated US importer)	3.84%	1 May 00-30 April 01
19. Certain pasta	I	A-475-818	66 FR 300, January 3, 2002	67 FR 5088, February 4, 2002	Ferrara Pallante PAM	1.25% 1.78% 4.10%	1 July 99-30 June 00
20. Certain pasta	I	A-475-818	68 FR 6882, February 11, 2003		Pastifi Garofalo	0.55%	1 July 00-30 June 01
21. Stainless steel sheet strip coils	I	A-475-824	67 FR 1715, January 14, 2002		Acciai Speciali Terni SpA	0.66%	4 January 99-30 June 00
22. Stainless steel sheet strip coils	I	A-475-824	68 FR 6719, February 10, 2003		Acciai Speciali Terni SpA	5.84%	1 July 00-30 June 01
23. Granular polytetrafluoenthylene	I	A-475-703	67 FR 1960, January 15, 2002		Ausimont SpA	2.15%	1 August 99-31 July 00
24. Granular polytetrafluoenthylene	I	A-475-703	68 FR 2007, January 15, 2003		Ausimont SpA	12.08%	1 August 00-31 July 01
25. Stainless steel sheet strip coils	F	A-427-814	67 FR 6493, February 12, 2002	67 FR 12522, March 19, 2002	Ugine	3.00%	4 January 99-30 June 00

ANNEX II ADMINISTRATIVE REVIEWS							
Product	MS	No Case	Final Results	Amended Final Results	Company	Dumping Margin	Period covered by the Review
26. Stainless steel sheet strip coils	F	A-427-814	67 FR 78773, December 26, 2002	68 FR 4171, January 28, 2003	Ugine	1.44%	1 July 00-30 June 01
27. Stainless steel sheet strip coils	G	A-428-825	67 FR 7668, February 20, 2002	67 FR 15178, March 29, 2002	KTN	2.61%	4 January 99-30 June 00
28. Stainless steel sheet strip coils	G	A-428-825	68 FR 6716, February 10, 2003	68 FR 14193, March 24, 2003	TKN	4.74%	1 July 00-30 June 01
29. Ball bearings	F	A-427-801	67 FR 55780, August 30, 2002		SKF France SA and Sarma	8.51%	1 May 00-30 April 01
30. Ball bearings	I	A-475-801	67 FR 55780, August 30, 2002		FAG Italia SpA SKF Industrie SpA	1.42% 3.70%	1 May 00-30 April 01
31. Ball bearings	UK	A-412-801	67 FR 55780, August 30, 2002		NSK Bearings Europe Ltd The Barden Corporation UK	16.87% 3.87%	1 May 00-30 April 01

United States—Anti-Dumping Administrative Review on Imports of Industrial Nitrocellulose from France

Specific Case No. 16

The administrative review

This case concerns the administrative review of anti-dumping duties on Industrial Nitrocellulose from France, produced and exported by Bergerac NC. (US case number A-427-009, 66 FR 54213 of 26 October 2001). The period of review is 1 August 1999 through 31 July 2000 and the rate of anti-dumping duty for Bergerac NC was 3.26% *ad valorem*.

Dumping margin without zeroing

DOC calculated a dumping margin of 3.26% while without the zeroing methodology (i.e. with the negative unit margins included), the dumping margin would have been [...%] (lower).

United States—Anti-Dumping Administrative Review on Imports of Industrial Nitrocellulose from the United Kingdom

Specific Case No. 17

The administrative review

This case concerns the administrative review of anti-dumping duties on Industrial Nitrocellulose from the United Kingdom, produced and exported by Imperial Chemical Industries PLC. (US case number A-412-803, 67 FR 77747 of 19 December 2002). The period of review is 1 July 2000 through 30 June 2001 and the rate of anti-dumping duty for Imperial Chemical Industries was 3.06% *ad valorem*.

Dumping margin without zeroing

DOC calculated a dumping margin of 3.06% while without the zeroing methodology (i.e. with the negative unit margins included), the dumping margin would have been [- ...%] (negative) and no anti-dumping duty would have been collected.

United States—Anti-Dumping Administrative Review on Imports of Stainless Steel Plate in Coils from Belgium

Specific Case No. 18

The administrative review

This case concerns the administrative review of anti-dumping duties on Stainless Steel Plate in Coils from Belgium, produced and exported by ALZ NV (US case number A-423-808, 67 FR 64352 of 18 October 2002). The period of review is 1 May 2000 through 30 April 2001 and the rate of anti-dumping duty for ALZ NV was 3.84% *ad valorem*.

Dumping margin without zeroing

DOC calculated a dumping margin of 3.84% while without the zeroing methodology (i.e. with the negative unit margins included), the dumping margin would have been [- ..%] (negative) and no anti-dumping duty would have been collected.

United States—Anti-Dumping Administrative Review on Certain Pasta from Italy

Specific Case No. 19

The administrative review

This case concerns the administrative review of anti-dumping duties on Certain Pasta from Italy, produced and exported by Pastificio Guido Ferrara S.r.L. (Ferrara), Pastificio Antonio Pallante S.r.L. (Pallante) and PAM S.r.L. (PAM). (US case number A-475-818, 66 FR 300 of 3 January 2002, 67 FR 5088 of 4 February 2002). The period of review is 1 July 1999 through 30 June 2000 and the rate of anti-dumping duty was, *ad valorem*, 1.25% for Ferrara, 1.78% for Pallante, 4.10% for PAM.

Dumping margin without zeroing

DOC calculated for Ferrara a dumping margin of 1.25% while without the zeroing methodology (i.e. with the negative unit margins included), the dumping margin would have been [...%] (lower).

As for Pallante, DOC calculated a dumping margin of 1.78%, while without the zeroing methodology (i.e. the negative unit margins included), the dumping margin would have been [...%] (lower).

As for PAM, DOC calculated a dumping margin of 4.10%, while without the zeroing methodology (i.e. the negative unit margins included), the dumping margin would have been *de minimis*.

United States—Anti-Dumping Administrative Review on Certain Pasta from Italy

Specific Case No. 20

The administrative review

This case concerns the administrative review of anti-dumping duties on Certain Pasta from Italy, produced and exported by Pastificio Garofalo S.p.A. (US case number A-475-818, 68 FR 6882 of 11 February 2003). The period of review is 1 July 2000 through 30 June 2001 and the rate of anti-dumping duty was 0.55% *ad valorem*.

Dumping margin without zeroing

DOC calculated a dumping margin of 0.55% while without the zeroing methodology (i.e. with the negative unit margins included), the dumping margin would have been [...%] (lower).

United States—Anti-Dumping Administrative Review on Imports of Stainless Steel Sheet Strip in Coils from Italy

Specific Case No. 21

The administrative review

This case concerns the administrative review of anti-dumping duties on Stainless Steel Sheet Strip in Coils from Italy, produced and exported by Acciai Speciali Terni SpA (US case number A-475-824, 67 FR 1715 of 14 January 2002). The period of review is 4 January 1999 through 30 June 2000 and the rate of anti-dumping duty for Acciai Speciali Terni SpA was 0.66% *ad valorem*.

Dumping margin without zeroing

DOC calculated a dumping margin of 0.66% while without the zeroing methodology (i.e. with the negative unit margins included), the dumping margin would have been [-...%] (negative) and no anti-dumping duty would have been collected.

United States—Anti-Dumping Administrative Review on Imports of Stainless Steel Sheet Strip in Coils from Italy

Specific Case No. 22

The administrative review

This case concerns the administrative review of anti-dumping duties on Stainless Steel Sheet Strip in Coils from Italy, produced and exported by Acciai Speciali Terni SpA (US case number A-475-824, 68 FR 6719 of 10 February 2003). The period of review is 1 July 2000 through 30 June 2001 and the rate of anti-dumping duty for Acciai Speciali Terni SpA was 5.84% *ad valorem*.

Dumping margin without zeroing

DOC calculated a dumping margin of 5.84% while without the zeroing methodology (i.e. with the negative unit margins included), the dumping margin would have been [- ...%] (negative).

United States—Anti-dumping Administrative Review on Imports of Granular Polytetrafluoroenthylene Resin from Italy

Specific Case No. 23

The administrative review

This case concerns the administrative review of anti-dumping duties on Granular Polytetrafluoroenthylene resin from Italy, produced and exported by Ausimont SpA. (US case number A-475-703, 67 FR 1960 of 15 January 2002). The period of review is 1 August 1999 through 31 July 2000 and the rate of anti-dumping duty for Ausimont SpA SA was 2.15% *ad valorem*.

Dumping margin without zeroing

DOC calculated a dumping margin of 2.15% while without the zeroing methodology (i.e. with the negative unit margins included), the dumping margin would have been [...%] (lower).

United States—Anti-Dumping Administrative Review on Imports of Granular Polytetrafluoroenthylene Resin from Italy

Specific Case No. 24

The administrative review

This case concerns the administrative review of anti-dumping duties on Granular Polytetrafluoroenthylene Resin from Italy, produced and exported by Ausimont SpA. (US

case number A-475-703, 68 FR 2007 of 15 January 2003). The period of review is 1 August 2000 through 31 July 2001 and the rate of anti-dumping duty for Ausimont SpA SA was 12.08% *ad valorem*.

Dumping margin without zeroing

DOC calculated a dumping margin of 12.08% while without the zeroing methodology (i.e. with the negative unit margins included), the dumping margin would have been [...%] (lower).

United States—Anti-Dumping Administrative Review on Imports of Stainless Steel Sheet and Strip in Coils from France

Specific Case No. 25

The administrative review

This case concerns the administrative review of anti-dumping duties on Stainless Steel Sheet and Strip in Coils from France, produced and exported by Ugine (US case number A-427-814, 67 FR 6493 of 12 February 2002, 67 FR 12522 of 19 March 2002). The period of review is 4 January 1999 through 30 June 2000 and the rate of anti-dumping duty for Ugine was 3.00% *ad valorem*.

Dumping margin without zeroing

DOC calculated a dumping margin of 3.00% while without the zeroing methodology (i.e. with the negative unit margins included), the dumping margin would have been [- ...%] (negative) and no anti-dumping duty would have been collected.

United States—Anti-Dumping Administrative Review on Imports of Stainless Steel Sheet and Strip in Coils from France

Specific Case No. 26

The administrative review

This case concerns the administrative review of anti-dumping duties on Stainless Steel Sheet and Strip in Coils from France, produced and exported by Ugine SA (US case number A-427-814, 67 FR 78773 of 26 December 2002, 68 FR 4171 of 28 January 2003). The period of review is 1 July 2000 through 30 June 2001 and the rate of anti-dumping duty for Ugine SA was 1.44% *ad valorem*.

Dumping margin without zeroing

DOC calculated a dumping margin of 1.44% while without the zeroing methodology (i.e. with the negative unit margins included), the dumping margin would have been [- ...%] (negative) and no anti-dumping duty would have been collected.

United States—Anti-Dumping Administrative Review on Imports of Stainless Steel Sheet and Strip in Coils from Germany

Specific Case No. 27

The administrative review

This case concerns the administrative review of anti-dumping duties on Stainless Steel Sheet and Strip in Coils from Germany, produced and exported by KTN (US case number A-428-825, 67 FR 7668 of 20 February 2002, 67 FR 15178 of 29 March 2002). The period of review is 4 January 1999 through 30 June 2000 and the rate of anti-dumping duty for KTN was 2.61% *ad valorem*.

Dumping margin without zeroing

DOC calculated a dumping margin of 2.61% while without the zeroing methodology (i.e. with the negative unit margins included), the dumping margin would have been [– ..%] (negative) and no anti-dumping duty would have been collected.

United States—Anti-Dumping Administrative Review on Imports of Stainless Steel Sheet and Strip in Coils from Germany

Specific Case No. 28

The administrative review

This case concerns the administrative review of anti-dumping duties on Stainless Steel Sheet and Strip in Coils from Germany, produced and exported by TKN (US case number A-428-825, 68 FR 6716, February 10, 2003, 68 FR 14193, March 24, 2003). The period of review is 1 July 2000 through 30 June 2001 and the rate of anti-dumping duty for TKN was 4.74% *ad valorem*.

Dumping margin without zeroing

DOC calculated a dumping margin of 4.74% while without the zeroing methodology (i.e. with the negative unit margins included), the dumping margin would have been [– ..%] (negative) and no anti-dumping duty would have been collected.

United States—Anti-Dumping Administrative Review on Imports of Ball Bearings from France

Specific Case No. 29

The administrative review

This case concerns the administrative review of anti-dumping duties on Ball Bearings from France, produced and

exported by SKF France SA and Sarma (US case number A-427-801, 67 FR 55780 of 30 August 2002). The period of review is 1 May 2000 through 30 April 2001 and the rate of anti-dumping duty for SKF France SA and Sarma was 8.51% *ad valorem*.

Dumping margin without zeroing

DOC calculated a dumping margin of 8.51% while without the zeroing methodology (i.e. with the negative unit margins included), the dumping margin would have been [-..%] (negative) and no anti-dumping duty would have been collected.

United States—Anti-Dumping Administrative Review on Imports of Ball Bearings from Italy

Specific Case No. 30

The administrative review

This case concerns the administrative review of anti-dumping duties on Ball Bearings from Italy, produced and exported by SKF Industrie SpA and FAG Italia SpA (US case number A-475-801, 67 FR 55780 of 30 August 2002). The period of review is 1 May 2000 through 30 April 2001 and the rate of anti-dumping duty was, *ad valorem*, 3.70% for SKF Industrie SpAand 1.42% for FAG Italia SpA.

Dumping margin without zeroing

DOC calculated a dumping margin for SKF Industrie SpA of 3.70% while without the zeroing methodology (i.e. with the negative unit margins included), the dumping margin would have been [-..%] (negative) and no anti-dumping duty would have been collected.

As for FAG Italia SpA, DOC calculated a dumping margin of 1.42% while without the zeroing methodology the dumping margin would have been [– ..%] (negative) and no anti-dumping duty would have been collected.

United States—Anti-Dumping Administrative Review on Imports of Ball Bearings from the United Kingdom

Specific Case No. 31

The administrative review

This case concerns the administrative review of anti-dumping duties on Ball Bearings from the United Kingdom, produced and exported by NSK Bearings Europe Ltd and the Barden Corporation UK (US case number A-412-801, 67 FR 55780 of 30 August 2002). The period of review is 1 May 2000 through 30 April 2001 and the rate of anti-dumping duty was, *ad valorem*, 16.87% for NSK Bearings Europe Ltd and 3.87% for the Barden Corporation UK.

Dumping margin without zeroing

DOC calculated for NSK Bearings Europe Ltd a dumping margin of 16.87% while without the zeroing methodology (i.e. with the negative unit margins included), the dumping margin would have been [- ...%] (negative) and no anti-dumping duty would have been collected.

As for the Barden Corporation UK, DOC calculated a dumping margin of 3.87%, while without the zeroing methodology (i.e. with the negative unit margins included), the dumping margin would have been [– ..%] (negative) and no anti-dumping duty would have been collected.

APPENDIX H

U.S. STATEMENTS AT THE WTO DISPUTE SETTLEMENT BODY MEETING

Geneva,
May 30, 2006

Item 1. UNITED STATES—LAWS, REGULATIONS AND METHODOLOGY FOR CALCULATING DUMPING MARGINS ("ZEROING")

A. IMPLEMENTATION OF THE RECOMMENDATIONS OF THE DSB

• Mr. Chairman, I am able to inform you that the United States intends to implement the DSB recommendations and rulings. The United States will need a reasonable period of time in which to do so.

• The United States stands ready to discuss this matter with the European Communities, in accordance with Article 21.3(b) of the DSU.

• However, the United States remains of the view that the Appellate Body report in this dispute is a deeply flawed document.

• We have considered the comments made by other Members at the May 9 DSB meeting regarding the Appellate Body report, and have continued our own study of the report. Unfortunately, the more we examine the report, the greater our concerns become.

• To further assist Members in their review of the report, we have provided some responses to comments we have heard and set forth some additional concerns in a written document, which currently is being distributed and which supplements the document we submitted at the meeting on May 9. We will request that this communication be circulated to all Members as a DS document.

- Rather than reading this document in its entirety, let me simply summarize the areas of concern that we discuss at greater length in the written document.

- First, there is the feet that in certain key areas the Appellate Body based its analysis not on the text of the Antidumping Agreement but rather on its own prior reports, particularly its report in US—Softwood Lumber V (DS264).

    - As just one example, the Appellate Body relied heavily on its interpretation of the term "product as a whole." However, "product as a whole" is a term that is not found anywhere in the Antidumping Agreement nor in Article VI of the GATT 1994.

    - Instead, it is a term that the Appellate Body used specifically in the context of the first sentence of Article 2.4.2 of the Antidumping Agreement and the average-to-average comparison method, the method that was at issue in the original Softwood Lumber V dispute.

    - Moreover, the Appellate Body misinterpreted its prior reports, thereby arriving at the erroneous conclusion that any kind of aggregated comparison requires an offset, regardless of context.

- The Appellate Body compounded its error by finding that the margin of dumping cannot be calculated on a transaction-specific basis.

    - The Appellate Body relied on Article 6.10 of the Antidumping Agreement to find that margins of dumping must invariably be established on an exporter- or producer-specific basis, which it assumed was inconsistent with calculating a margin of dumping on a transaction-specific basis.

    - However, Article 6.10 simply provides that a Member must calculate a margin for each individual exporter or producer—as opposed to one margin for all exporters or

producers. Article 6.10 says nothing about whether the margin must be based on more than one transaction, and it does not prohibit the calculation of a margin of dumping on a transaction-specific basis.

- There is also the matter of the Appellate Body's reliance on Article VI of the GATT 1994 and Article 2.1 of the Antidumping Agreement.

  - Mr. Chairman, as the United States previously explained, these provisions did not change as a result of the Uruguay Round negotiations.

  - The Appellate Body's conclusion essentially requires one to believe that the Uruguay Round negotiators dealt with zeroing by secretly agreeing to a new interpretation of the unchanged text of Article VI and Article 2.1. This is not plausible.

  - Moreover, the logic of the Appellate Body's conclusion is that all of the Members that continued to use zeroing after the entry into force of the WTO—including at least the EC, the United States, and Canada—did so in contradiction of this secret agreement and so acted in bad faith.

- And whether one accepts the Appellate Body's reading as permissible or not, the fact remains that other official, impartial experts reviewing these same provisions at the mandate of the DSB have concluded that there are other permissible interpretations of these same provisions. Under the standard or review articulated in the Antidumping Agreement, where a Member's measure rests on a permissible interpretation, the measure is required to be found in conformity with the agreement.

- Mr. Chairman. I could go on, but I won't.

- Instead, let me conclude by reiterating that the United States considers the issues presented by the Appellate Body

report to be important, and we welcome a discussion of them with Members.

[Second intervention:]

• Mr. Chairman, I would like to respond briefly to the EC's reference to Article 17.14 of the DSU, which states that adopted Appellate Body reports shall be unconditionally accepted by parties to a dispute.

• The United States notes that, from the inception of the WTO, Members have expressed their concerns with Appellate Body reports. For example, my EC colleagues will recall the EC's statements regarding the Bananas report (WT/DSB/M/37), the Mexico—Rice report (WT/DSB/M/202), and the Frozen Poultry report (WT/DSB/M/198).

• In so doing, Members have taken seriously their responsibility to the WTO dispute settlement system and have attempted to ensure that it is serving its function well. Expressing concerns with a report does not mean that a Member is "conditioning" its acceptance of the report.

• So, for example, in this dispute, the United States has not set any "conditions" on its acceptance of the report.

Item "OTHER BUSINESS"

A. STATEMENT BY MEXICO ON UNITED STATES—ANTI-DUMPING MEASURES ON OIL COUNTRY TUBULAR GOODS FROM MEXICO (WT/DS282)

• The United States thanks Mexico for its statement, which we will convey to capital.

• We have been in close contact with Mexico during the reasonable period of time regarding the redetermination in this matter, and we will continue to apprise Mexico with respect to this matter.

APPENDIX I

DEPARTMENT OF COMMERCE

International Trade Administration

Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (''the Department'') is requesting comments regarding the calculation of the weighted average dumping margin in an antidumping duty investigation. Currently, the Department usually makes comparisons between average export prices and average normal values and does not offset any dumping that is found with the results of comparisons for which the average export price exceeds the average normal value. A recent WTO dispute settlement report has found that the United States application of this methodology was inconsistent with our WTO obligations. In response to this report, the Department will abandon the use of average–to-average comparisons without such offsets. The Department seeks comment on the alternative approach(s) that may be appropriate in future investigations.

EFFECTIVE DATE: March 6, 2006.

DATES: To be assured of consideration, written comments must be received no later than 30 days after the date of publication in the Federal Register. Rebuttal comments must be received no later than 45 days after the publication date.

ADDRESS: Submit comments to David Spooner, Assistant Secretary for Import Administration, U.S. Department of Commerce, Central Records Unit, Room 1870, Pennsylvania Avenue and 14th Street, NW., Washington, DC 20230; Attention: Weighted Average Dumping Margin.

FOR FURTHER INFORMATION CONTACT:

Michael Rill at 202) 482-3058, Mark Barnett at (202) 482-2866, or William Kovatch at (202) 482-5052.

SUPPLEMENTARY INFORMATION:

Background

Pursuant to section 777A(d) (1) (A) of the Tariff Act of 1930, in an investigation, the Department may determine whether the subject merchandise is being sold at less than fair value either by comparing weighted average normal values to weighted average export prices[1] of comparable merchandise (the average-to-average comparison methodology), or by comparing normal values of individual transactions to the export prices[1] of individual transactions for comparable merchandise (the transaction-to-transaction comparison methodology). The Department's regulations state that the Department will normally use the average-to-average comparison methodology in an investigation. 19 C.F.R. 351.414(c)(1).

In applying the average-to-average methodology during an investigation, the Department usually divides the export transactions into groups by model and level of trade (''averaging groups''), and compares an average of the export price of transactions within one group to an average normal value for the same or similar model of the foreign like product at the same or most similar level of trade. When aggregating the results of the comparisons of averaging groups in order to determine the weighted average dumping margin, the Department has not allowed the results of averaging groups for which export price exceeds normal

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[1] The Department may also use constructed export prices, if appropriate. Because the use of export prices or constructed export prices is not relevant to the substance of this notice, the Department refers only to export prices hereafter.

value to offset the results of averaging groups for which export price is less than normal value.[2]

The European Communities ("EC") challenged the denial of offsets, both "as such," and "as applied" in certain administrative determinations, as being inconsistent with the World Trade Organization ("WTO") Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Antidumping Agreement") before a dispute settlement panel. The panel circulated its report on October 31, 2005, finding, with respect to the specific antidumping duty investigations subject to the EC's challenge, that the Department's denial of offsets when using the average-to-average comparison methodology in an investigation is inconsistent with Article 2.4.2 of the Antidumping Agreement.[3] The United States has not appealed this aspect of the panel's report.

Proposal for Calculating the Weighted Average Dumping Margin in an Antidumping Investigation and Request for Comments

Pursuant to section 123(g)(1) of the Uruguay Round Agreements Act ("the URAA"), "[i]n any case in which a dispute settlement panel or the Appellate Body finds in its report that a regulation or practice of a department or agency of the United States is inconsistent with any of the Uruguay Round Agreements," certain requirements must be met before "that regulation or practice" may be "amended,

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[2] Section 771(35)(A) of the Act defines the dumping margin as the amount by which normal value "exceeds" export or constructed export price. Section 771(35)(B) defines the weighted average dumping margin as the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export or constructed export price of that exporter or producer.

[3] Panel Report, *United States—Laws, Regulations and Methodology for Calculating Dumping Margins* (*"US—Zeroing"*), WT/DS294/R, para. 7.32, circulated October 31, 2005 (*"Zeroing"*).

rescinded, or otherwise modified . . . ." Section 123(g)(1)(C) of the URAA requires that the Department provide opportunity for public comment by publishing "the proposed modifications and the explanation of the modification" in the Federal Register.

The WTO panel in US—*Zeroing* has found the denial of offsets in certain antidumping duty investigations, when using the average-to-average comparison methodology, to be inconsistent with Article 2.4.2 of the Antidumping Agreement.[4] Accordingly, the Department proposes that it will no longer make average–to-average comparisons without providing offsets for non–dumped comparisons.

The Department is soliciting comments pertaining to this proposal and appropriate methodologies to be applied in future antidumping duty investigations in light of the panel's report in *US—Zeroing*.

Timetable

After considering all comments received, the Department intends to publish in the Federal Register a final notice regarding the calculation of the weighted average dumping margin using the average-to-average comparison methodology in an investigation. See section 123(g)(1)(F) of the URAA (19 U.S.C. 3533(g)(1)(F)). Any changes in methodology will be applied in all investigations initiated on the basis of petitions received on or after the first day of the month following the date of publication of the Department's final notice of the new weighted average dumping margin calculation methodology.

Comments—Format

Parties wishing to comment should submit a signed original and six copies of each set of comments, including reasons

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[4] *US—Zeroing*, para. 7.32.

for any recommendations, along with a cover letter identifying the commenter's name and address. To help simplify the processing and distribution of comments and rebuttals, the Department requests that a submission in electronic form accompany the required paper copies. Comments filed in electronic form should be on CD—ROM in either WordPerfect format or a format that the WordPerfect program can convert into WordPerfect.

Comments received on CD—ROM will be made available to the public on the Web at the following address: http://ia.ita.doc.gov/. In addition, upon request, the Department will make comments filed in electronic form available to the public on CD—ROMs (at cost) with specific instructions for accessing compressed data (if necessary). Any questions concerning file formatting, document conversion, access on the Web, or other electronic filing issues should be addressed to Andrew Lee Beller, IA Webmaster, at (202) 482-0866 or via e-mail at *andrew.beller@mail.doc.gov*.

Dated: February 28, 2006.

David M. Spooner,
Assistant Secretary for Import Administration.

[FR Doc. 06-2134 Filed 3-3-06; 1:14 pm]

APPENDIX J

DEPARTMENT OF COMMERCE
International Trade Administration

Antidumping Proceedings: Calculation of the Weighted–Average Dumping Margin During an Antidumping Investigation; Final Modification

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Final Modification; Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation.

SUMMARY: The Department of Commerce is modifying its methodology in antidumping investigations with respect to the calculation of the weighted-average dumping margin. This final modification is necessary to implement the recommendations of the World Trade Organization Dispute Settlement Body. Under this final modification, the Department will no longer make average-to-average comparisons in investigations without providing offsets for non-dumped comparisons. The schedule for implementing this change is set forth in the "Timetable" section, below.

DATES: The effective date of this final modification is January 16, 2007.

FOR FURTHER INFORMATION CONTACT:

Mark Barnett (202) 482-2866, William Kovatch (202) 482-5052, or Michael Rill at (202) 482-3058.

SUPPLEMENTARY INFORMATION:

Background

This change in methodology concerns the calculation of the weighted-average dumping margin in investigations using the average-to-average comparison methodology.

Article 2.4.2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Antidumping Agreement) provides:

> Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction to transaction basis.

Section 777A(d)(1)(A) of the Tariff Act of 1930, as amended (the Act), implements this provision of the Antidumping Agreement, providing that normally in an antidumping investigation, the Department may determine whether the subject merchandise is being sold at less than fair value through one of two options. The Department may compare a weighted-average of normal value to a weighted-average of the export or constructed export prices of comparable merchandise, known as the average-to-average comparison methodology. The Department also may compare normal values of individual transactions to the export prices or constructed export prices of individual transactions for comparable merchandise, known as the transaction-to-transaction comparison methodology.[1] The Statement of Administrative Action accompanying the Uruguay Round Agreements Act (URAA),

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[1] Section 777A(d)(1)(B) of the Act also provides for an exceptional methodology to be used in antidumping investigations. The Department may compare a weighted-average normal value to the export prices or constructed export prices of individual transactions if there is a pattern of export prices or constructed export prices that differs significantly among purchasers, regions or periods of time, and the Department explains why such differences cannot be taken into account using one of the methods described in section 777A(d)(1)(A). This is known as the targeted dumping or average-to-transaction methodology.

H.R. Doc. No. 103-316, Vol. 1 at 842-43 (1994), reprinted in U.S.C.C.A.N. 3773 (SAA), and the Department's regulations state that the Department normally will use the average-to-average comparison methodology in an investigation. 19 CFR 351.414(c)(1).

When the Department applies the average-to-average methodology during an investigation, the Department usually divides the export transactions into groups by model and level of trade ("averaging groups"). 19 CFR 351.414(d)(2). The Department then compares an average of the export prices or constructed export price of the transactions within one averaging group to the weighted-average of normal values of such sales. 19 CFR 351.414(d)(1).

Prior to this modification, when aggregating the results of the averaging groups in order to determine the weighted-average dumping margin, the Department did not permit the results of averaging groups for which the weighted-average export price or constructed export price exceeds the normal value to offset the results of averaging groups for which the weighted-average export price or constructed export price is less than the weighted-average normal value.

In October 2005, a World Trade Organization (WTO) dispute settlement panel issued a report in *United States – Laws, Regulations and Methodology for Calculating Dumping Margins* ("*Zeroing*") (*WT/DS294*) ("*US Zeroing (EC)*"). The panel found, among other things, that the Department's denial of offsets when using the average-to-average comparison methodology in certain antidumping investigations challenged by the European Communities ("EC") was inconsistent with Article 2.4.2 of the Antidumping Agreement.[2] The United States did not appeal this aspect of the panel's report.

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[2] Panel Report, *United States - Laws, Regulations and Methodology for Calculating Dumping Margins* ("*Zeroing*"), WT/DS294

On March 6, 2006, the Department published a notice in the Federal Register (71 FR 11189) proposing that it would no longer make average-to-average comparisons in investigations without providing offsets for non-dumped comparisons. In that notice, the Department solicited comments and rebuttal comments on its proposal and appropriate methodologies to be applied in future antidumping investigations in light of the panel's report in *US-Zeroing (EC)*. On April 25, 2006, the Department extended the period of time for the submission of rebuttal comments (71 FR 23898). The Department received numerous comments and rebuttal comments submitted pursuant to these notices, as discussed below.

Final Modification Concerning the Calculation of the Weighted–Average Dumping Margin During an Antidumping Investigation

After considering all of the comments submitted, the Department is adopting this final modification concerning the calculation of the weighted-average dumping margin. The Department will no longer make average-to-average comparisons in investigations without providing offsets for non-dumped comparisons.

Analysis of Public Comments

Numerous comments and rebuttal comments were submitted in response to the Proposed Modification. We have carefully considered each of the comments submitted. We have grouped and summarized the comments below according to common themes and responded accordingly.

Whether to Adopt the Department's Proposal

Some commentors welcomed the Department's proposal to permit offsets when making average-to-average comparisons, which would bring the Department's methodology into conformity with U.S. international obligations.

Other commentors argue that the denial of offsets creates more accurate results, because it combats the phenomenon of masked dumping. According to these commentors, masked dumping occurs when import transactions which are sold at less than normal value are masked by those sold at prices greater than normal value. The U.S. Court of Appeals for the Federal Circuit, these commentors note, has upheld the denial of offsets on these grounds. These commentors argue that if the Department is to grant offsets, it should do so on the narrowest grounds possible.

A few commentors argue that the Department cannot provide offsets without a statutory change. These commentors contend that the denial of offsets is required by the statute, because otherwise one of the permitted comparison methodologies would become redundant. According to these commentors, the statute permits the use of the average-to-average comparison methodology, the transaction-to-transaction comparison methodology, and, in some circumstances, the average-to-transaction comparison methodology. If offsets were for non-dumped sales are provided, the results of the average-to-average and the average-to-transaction comparison methodologies would be mathematically equivalent. To avoid this outcome, the Department must interpret the statute to require the denial of offsets.

Other commentors rebut this argument, contending that the use of the average-to-transaction comparison methodology will not necessarily be mathematically equivalent to the use of the average-to-average comparison methodology.

Department's Position: The Department is adopting as its final modification its proposal that it will no longer make average-to-average comparisons in investigations without providing offsets for non-dumped comparisons. The Department is doing so in response to the panel's report in *US – Zeroing (EC)*, following the procedures set forth in section 123 of the URAA.

While some commentors argue that this modification requires a change in statute, the Department disagrees. Specifically, the courts have consistently held that the denial of offsets is not required by statute, but rather is a result of an interpretation of the statute. *See Corus Staal BV v. Department of Commerce*, 395 F.3d 1343, 1347 (Fed. Cir. 2005), *cert. denied*, 126 S. Ct. 1023 (2006); *Timken Co. v. United States*, 354 F.3d 1334, 1341-42 (Fed. Cir.), *cert. denied sub nom., Koyo Seiko Co. v. United States*, 543 U.S. 976 (2004). *See also Paul Muller Industrie GmbH v. United States*, 435 F. Supp. 2d 1241, 1245 (CIT 2006) (stating new argument alone does not defeat binding precedent).

While we recognize that the Department may not interpret or apply the statute in a way so as to nullify a statutory provision, the Department is not making such an interpretation. This final modification is addressing only the calculation of the weighted-average dumping margin in an investigation using the average-to-average comparison methodology and not the average-to-transaction comparison methodology. The argument that the targeted dumping methodology would be nullified presumes that offsets would be provided under that methodology and that certain other methodological choices would be made. To date, the Department has not used the targeted dumping comparison methodology, nor made any determination as to the issue of offsets pursuant to that methodology. Consequently, to the extent appropriate, the Department will consider the nullification argument when it applies the targeted dumping methodology.

Whether the Average-to-Average Comparison Methodology Should Continue to be the Department's Preferred Methodology in Investigations

Some commentors argue that the average-to-average comparison methodology should continue to be the preferred methodology for use in an antidumping investigation. This would be consistent with the SAA and the Department's own

regulations. The use of the average-to-average comparison methodology simplifies the calculation of the weighted-average dumping margin, because it involves much simpler matching of export prices and normal values than would be involved if the transaction-to-transaction comparison methodology were used. According to these commentors, the average-to-average comparison methodology yields more predictable results because it is less sensitive to aberrational sales and price fluctuations due to market forces. The average-to-average comparison methodology is appropriate to use when there are a large number of sales, whereas 19 CFR 351.414(c)(1) states that the transaction-to-transaction comparison methodology is more appropriate for investigations involving few sales and the merchandise sold in both markets is identical, very similar, or custom-made.

Some of these commentors argued that even if the Department were to use the transaction-to-transaction comparison methodology, the application of that methodology should include the provisions of offsets. According to these commentors, the denial of offsets when using transaction-to-transaction comparison methodology results in an even more unbalanced calculation than the denial of offsets when using the average-to-average comparison methodology because the transaction-to-transaction comparisons would eliminate any impact of non-dumped sales.

Other commentors argue that the transaction-to-transaction comparison methodology with the denial of offsets should become the Department's standard methodology in antidumping investigations. These commentors note that the use of the transaction-to-transaction comparison methodology is permitted by statute. The Department has used this methodology recently in the Section 129 determination in *Certain Softwood Lumber Products from Canada*, and a WTO panel upheld its application. Any concerns over the complexity of applying the transaction-to-transaction comparison methodology are

alleviated by technological advances that ease the burden of matching a single normal value transaction to a single export transaction.

Some commentors argue that the Department itself has not proposed any change in methodology other than providing for offsets when engaging in average-to-average comparisons. According to these commentors, the Department cannot adopt a new comparison methodology without fulfilling the applicable notice and comment requirements of both section 123(g) of the URAA and the Administrative Procedures Act.

Department's Position: While the statute itself does not provide for a preference between the use of the average-to-average and transaction-to-transaction comparison methodologies in an antidumping investigation, the Department is mindful of the preference expressed in the SAA and in the Department's regulations for the use of average-to-average comparisons in investigations. See SAA at 842-43; 19 CFR 351.414(c)(1). Thus, we agree with those commentors that indicated that altering this preference would, at a minimum, require a change in regulation. Although the Department is not proposing a change of regulation at this time, the transaction-to-transaction methodology remains available to be used in appropriate situations.

Providing Offsets in All Types of Proceedings

Several commentors argue that the Department should provide offsets, not only when using the average-to-average comparison methodology in an antidumping investigation, but in all types of antidumping proceedings. These commentors contend that the denial of offsets violates overarching principles of fairness embodied in the WTO agreements. The distortion and inherent bias stemming from the denial of offsets apply equally to administrative reviews as they do to investigations. Moreover, this change would be simple to execute, as it would only require the deletion of a single line from the Department's standard computer programs.

Other commentors note that the finding of the WTO panel was narrow. The panel did not find that the denial of offsets in administrative reviews was inconsistent with the Antidumping Agreement, only that the Department's denial of offsets in certain investigations, when using the average-to-average comparison methodology, was inconsistent with the Antidumping Agreement. Moreover, if the Department were to provide offsets in other proceedings, it would need to provide a specific proposal and solicit further comments.

One commentor urges the Department to propose regulations to implement the targeted dumping provision of the Act. These regulations should specify that the Department will act whenever an interested party has demonstrated that targeted dumping is occurring, and should establish a threshold of when the price differences are significant enough to trigger the targeted dumping analysis.

Department's Position: In its March 6, 2006 Federal Register notice, the Department proposed only that it would no longer make average-to-average comparisons in investigations without providing offsets for non-dumped comparisons. The Department made no proposals with respect to any other comparison methodology or any other segment of an antidumping proceeding, and thus declines to adopt any such modifications concerning those other methodologies in this proceeding.

Adopting a Change During the Negotiation of the Doha Round

Several commentors argue that the Department should not adopt a change with respect to offsets while the Doha Round of negotiations is still underway. According to these commentors, Congress gave explicit negotiation instructions to defend the denial of offsets. Thus, the Department should not adopt a change and provide for offsets while the issue is still being negotiated.

Department's Position: The Department is conducting this exercise pursuant to the procedures specifically established by section 123 of the URAA. This exercise is necessary to implement the panel report in *US - Zeroing (EC)* within the reasonable period of time negotiated by the United States. Notwithstanding this determination, the Department will continue to work closely with United States Trade Representative to pursue the negotiating objectives of the United States in the Doha Round.

Whether the Department Should Change Its Methodology as it Applies to Constructed Value and Non–Market Economies

One commentor argues that the WTO panel report did not address the denial of offsets when the Department compares constructed value to export price, or when the Department engages in a non-market economy analysis. Accordingly, the Department should continue to deny offsets in these two situations.

Department's Position: The Department has declined to adopt this suggestion. As stated above, when the Department engages in an average-to-average comparison, it divides the sales of the subject merchandise into "averaging groups." These averaging groups usually consist of identical or virtually identical merchandise sold at the same level of trade. 19 CFR 351.414(d)(2). The Department then calculates a weighted-average of the export prices or constructed export prices of the sales included in the averaging group, and compares that to the weighted-average of the normal values of such sales. 19 CFR 351.414(d)(1).

The use of constructed value and the factors of production methodology concerns the manner by which the Department calculates the average normal value in the average-to-average comparisons.

For example, the Department bases its calculation of normal value on constructed value "where home market sales of

the merchandise in question are either nonexistent, in inadequate numbers, or inappropriate to serve as a benchmark for a fair price, such as where sales are disregarded because they are sold at below-cost prices." SAA at 839. Constructed value is calculated on a control number-specific basis, and compared to the average export price of the corresponding averaging group.

Similarly, pursuant to section 773(c) of the Act, when an investigation involves a non-market economy country, the Department calculates normal value based on the factors of production methodology. Under this methodology, in an investigation the Department calculates a control number-specific normal value and compares it to the average export price for the corresponding averaging group.

Whether normal value is based on home market sales, third country sales, constructed value, or the factors of production methodology does not alter the manner in which the comparison is made between the weighted-average export price and the weighted-average normal value or the manner in which those results are aggregated in an investigation. Thus, if the Department is to provide offsets for non-dumped sales when utilizing the average-to-average comparison methodology in an antidumping investigation, there is no basis for treating investigations involving constructed value or the factors of production methodology that also utilize the average-to-average comparison methodology in a different manner.

Whether Implementation Should Apply to On–Going Investigations

Some commentors argue that if the Department provides offsets when using the average-to-average comparison methodology during an antidumping investigation, this change should apply to all pending proceedings. These commentors argue that when a U.S. court announces a new interpretation of a statute it would apply to all pending cases. Failing to do

so would create unequal justice, and, according to these commentors, would be a deliberate and purposeful violation of the WTO Antidumping Agreement.

Other commentors note that there is no precedent for a retroactive implementation of a WTO dispute settlement report. Rather, sections 123 and 129 of the URAA, which govern implementation, set forth a specific effective date.

Department's Position: In the March 6, 2006 Federal Register notice, the Department stated:

> Any changes in methodology will be applied in all investigations initiated on the basis of petitions received on or after the first day of the month following the date of publication of the Department's final notice of the new weighted average dumping margin calculation methodology.

71 FR at 11189.

Section 123(g)(2) of the URAA provides that a final modification may not go into effect before the end of the 60-day period after the consultations described in section 123(g)(1)(E) begin, unless the President determines that an earlier effective date is in the national interest. While the statute establishes the manner of determining the effective date of any final modification adopted pursuant to section 123, the statute does not specify whether the final modification must apply only to new segments of proceedings initiated after the effective date, or may apply to any segments pending as of the effective date.

The SAA does not provide any more specific guidance regarding the application of any final modification adopted pursuant to section 123. The SAA states that section 129 determinations will apply only with respect to entries occurring on or after the effective date. SAA at 1026. However, the SAA makes no such statement with respect to section 123

modifications. The SAA merely states, "A final rule may not go into effect before the end of the 60-day consultation period unless the President determines that an earlier date is in the national interest." SAA at 1021.

In the prior four section 123 proceedings, the Department has applied the final modification or final rule to segments initiated after the effective date. *See, e.g., Procedures for Conducting Five-year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders*, 70 FR 62061 (October 28, 2005) (applying amended regulations to sunset reviews initiated on or after the effective date); *Notice of Final Modification of Agency Practice Under Section 123 of the Uruguay Round Agreements Act*, 68 FR 37125, 37138 (June 23, 2003) (applying new privatization methodology to investigations and reviews initiated on or after the effective date); *Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade*, 67 FR 69186, 69197 (November 15, 2002) ("Arm's Length Test") (applying new methodology to investigations and reviews initiated on or after the effective date); *Amended Regulation Concerning the Revocation of Antidumping and Countervailing Duty Orders*, 64 FR 51236 (September 22, 1999). However, on occasion the Department has adopted and applied a change in policy involving a statutory interpretation to all segments pending as of the date of the change. *See, e.g., Basis for Normal Value When Foreign Market Sales Are Below Cost*, Policy Bulletin 98.1 (February 23, 1998); *Treatment of Inventory Carrying Cost in Constructed Value*, Policy Bulletin 94.1 (March 25, 1994).

In the section 123 proceeding concerning the Arm's Length Test, the Department found it significant that section 123 uses the term "go into effect." 67 FR at 69196. Thus, the Department noted that section 123 does not preclude applying the change so as to affect entries made prior to the announcement of the change. *Id.*

After careful consideration of the arguments presented by the commentors and of the information needed to implement this change, and weighing the administrative burdens, the Department has determined to apply the final modification adopted through this proceeding to all investigations pending before the Department as of the effective date.

First, in this particular instance, applying this final modification to all investigations pending before the Department will not create any undue administrative burden on the Department. The number of pending antidumping investigations is few (*i.e.* there are seven ongoing antidumping investigations).

Second, applying this change will not require the Department to gather any new information in those investigations.

Third, this announcement of the Department's intention to apply this modification to all pending investigations will not prejudice any of the parties to those proceedings. All of the currently pending investigations were initiated as a result of petitions filed after the date of publication of the Department's proposed modification. Thus, all of the interested parties in each of these investigations had notice of the Department's intention to modify the manner in which it calculates the weighted–average dumping margin when using the average–to-average comparison methodology in investigations. Moreover, even in the most advanced of the on–going investigations, there is sufficient time to permit the parties to comment on the application of this approach prior to the final determination in the investigation. In those investigations in which the Department will have reached a preliminary determination prior to the effective date of this notice, the Department will provide parties with notice and an opportunity to comment on the application of this methodology on the record of the investigation.

Timetable

The effective date of this notice is January 16, 2007, which is sixty days after the date on which the United States Trade Representative and the Department began consultations with the appropriate congressional committees, consistent with section 123(g)(1)(E) of the URAA. This methodology will be used in implementing the findings of the WTO panel in *US - Zeroing (EC)* pursuant to section 129 of the URAA concerning the specific antidumping investigations challenged by the EC in that dispute. The Department will apply this final modification in all current and future antidumping investigations as of the effective date.

Dated: December 20, 2006. David Spooner,

APPENDIX K

UNITED STATES – SECTION 129(c) (1) OF THE URUGUAY ROUND AGREEMENTS ACT

(WT/DS221)

SECOND WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

March 8, 2002

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I. Introduction

1. After a round of submissions, a meeting before the Panel, and the submission of responses to a comprehensive set of Panel questions, the issues in this dispute have become increasingly clear.

2. First, although it continues to state otherwise, Canada is in fact trying to use the dispute settlement system to establish a difference in the rights and obligations that apply to Members implementing adverse World Trade Organization recommendations and rulings in cases involving antidumping or countervailing duty measures, based entirely on whether a Member uses a prospective or a retrospective system to determine liability for antidumping and countervailing duties. It is doing so on the basis of an arbitrary and fictitious distinction regarding when a determination is allegedly "final" or "definitive" under either system. Canada's alleged distinction finds no support in the text of the AD Agreement,[1] the SCM Agreement,[2] GATT 1994,[3] or the DSU.[4] The AD and SCM Agreements recognize both systems for duty assessment, and there is nothing in the Agreements indicating that the Agreements are intended to promote or create advantages or disadvantages for one approach over the other. Neither Agreement addresses the issue of implementation of adverse DSB recommendations and rulings, and Canada has abandoned any claims under the DSU.

3. Second, although Canada purports to agree that WTO remedies are prospective only, and that the only disagreement

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[1] *Agreement on Implementation of Article VI of the General Agreement on Tarifs and Trade 1994* (the "AD Agreement")

[2] *Agreement on Subsidies and Countervailing Measures* (the "SCM Agreement")

[3] *General Agreement on Tarifs and Trade* ("GATT 1994").

[4] *Understanding on Rules and Procedures for the Settlement of Disputes* (the "DSU").

in this dispute is what constitutes a "prospective" remedy, Canada is, in fact, seeking to establish an obligation for Members with retrospective systems to provide retroactive remedies in cases involving antidumping and countervailing duty measures. There is no basis in the text of the WTO Agreement for such a requirement. Antidumping and countervailing duty measures are border measures; they affect trade at the border. If an antidumping or countervailing duty measure is successfully challenged in WTO dispute settlement, a Member can implement the adverse recommendations and rulings of the Dispute Settlement Body ("DSB") in a prospective manner by revising or withdrawing the border measure. By doing so, the Member will ensure that all entries that take place on or after the implementation date—the date the measure is modified or removed—will be unaffected by the WTO-inconsistent measure.

4. Third, and most important, as Canada has continued to refine and articulate its legal arguments, it has become increasingly clear that Canada has fundamentally misinterpreted what section 129(c)(1) actually requires. The United States explains below why Canada has failed to establish a *prima facie* case that section 129(c)(1) mandates a breach of any of the WTO provisions that form the basis for its claims.

5. The purpose of this submission is not to repeat all of the arguments made to date, although the United States continues to maintain all of the views that it has expressed in previous submissions. Rather, this submission will focus on a few key issues. The United States will begin by explaining how Canada has misinterpreted section 129(c)(1) and why its arguments fail to demonstrate that section 129(c)(1) mandates a breach of any of the WTO provisions that it has raised. The United States will then address the lack of any basis for Canada's assertion that the scope of a Member's implementation obligations in antidumping or countervailing duty disputes is determined by the date on which a Member makes a "definitive" or "final" determination of duty liability, and

not by date of entry. The United States will conclude by explaining why Canada's responses to the Panel's questions demonstrate conclusively that it is, in fact, seeking to establish an obligation for Members with retrospective assessment systems to provide retroactive relief, despite the absence of any support for such a requirement in the text of the AD Agreement, the SCM Agreement, GATT 1994, or the DSU.

II. Canada Has Failed to Establish that Section 129(c)(1) of the URAA Mandates a Breach of U.S. Obligations Under the AD Agreement, the SCM Agreement, or GATT 1994

6. Canada's decision to challenge section 129(c)(1) in the absence of any application of the provision to an actual fact pattern has made it difficult to understand the nature and extent of its claims and arguments. As Canada has continued to elaborate on its views, however, particularly in response to the Panel's written questions, it has become increasingly clear that Canada's entire case is based on a misinterpretation of what section 129(c)(1) actually requires. As the United States explains below, Canada's arguments fail to establish that section 129(c)(1) mandates action inconsistent with the AD Agreement, the SCM Agreement, or GATT 1994.

A. Under Established WTO Jurisprudence, the Legislation of a Member Breaches That Member's WTO Obligations Only If the Legislation Mandates Action that Is Inconsistent with Those Obligations

7. It is well established under GATT and WTO jurisprudence that legislation of a Member breaches that Member's WTO obligations only if the legislation *mandates* action that is inconsistent with those obligations or precludes action that is consistent with those obligations. If the legislation provides discretion to authorities to act in a WTO-consistent manner, the legislation, as such, does not violate a Member's WTO obligations.

8. The Appellate Body has explained that "the concept of mandatory as distinguished from discretionary legislation was developed by a number of GATT panels as a threshold consideration in determining when legislation as such—rather than a specific application of that legislation—was inconsistent with a Contracting Party's GATT 1947 obligations."[5] This doctrine has continued under the WTO system, as panels and the Appellate Body have continued to apply the mandatory/discretionary distinction in considering whether a Member's legislation is WTO-consistent.

9. Most recently, the panel in the *Export Restraints* case applied the doctrine in concluding that certain provisions of the U.S. countervailing duty law did not mandate action inconsistent with provisions of the *Agreement on Subsidies and Countervailing Measures*.[6] The Panel in *Export Restraints* described the mandatory/discretionary distinction as a "classical test" with longstanding historical support.[7]

B. The Meaning of Section 129(c)(1) Is a Factual Question That Must Be Answered by Applying U.S. Principles of Statutory Interpretation

10. The United States has argued at length in its first written submission, in its oral statement at the first Panel meeting, and in its answers to the Panel's questions, that section 129(c)(1) does not breach WTO rules because "prospective" implementation in WTO disputes involving anti-dumping and countervailing duty measures requires a Member to ensure that the new determination applies to all merchandise that enters for consumption on or after the date

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[5] Appellate Body Report on *United States—Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, para. 88 *("U.S. 1916 Act AB Report")*.

[6] Panel Report on *United States—Measures Treating Export Restraints as Subsidies*, WT/DS194/R, adopted 23 August 2001, paras. 8.4—8.131.

[7] *Id.* at para. 8.9.

of implementation. However, even if Canada were correct in arguing that date of entry is not the controlling issue, section 129(c)(1) can violate WTO rules only if it *mandates* the actions that Canada alleges. If it does not do so, then Canada's claims must fail, regardless of what it means to implement a new determination in a WTO-consistent manner.

11. It is well-established that municipal law consists not only of the provisions being examined, but also domestic legal principles that govern the interpretation of those provisions.[8] While the Panel is not bound to accept the interpretation presented by the United States, the United States believes that the Panel should give considerable deference to the United States' views on the meaning of its own law.[9]

12. For purposes of ascertaining the meaning of section 129(c)(1) as a matter of U.S. law, U.S. courts and agencies must recognize the longstanding and elementary principle of U.S. statutory construction that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). While international obligations cannot override inconsistent requirements of domestic law, "ambiguous statutory provisions . . . [should] be construed, where possible, to be consistent with international obligations of the United States."[10]

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[8] *See, e.g.*, Panel Report on *United States—Section 301-310 of the Trade Act of 1974*, WT/DS152/R, adopted 27 January 2000, para. 7.108 & n. 681 ("*U.S. 301*").

[9] *U.S. 301*, para. 7.19.

[10] *Restatement (Third) of the Foreign Relations Law of the United States*, § 114 (1987) (Exhibit U.S.–11); and *U.S. 301*, note 681, in which the panel recognized the existence of what is known in the United States as "the *Charming Betsy* doctrine".

C. Canada's Arguments Fail to Establish that Section 129(c)(1) Mandates Action Inconsistent with WTO Rules

13. Canada makes a number of arguments regarding why section 129(c)(1) allegedly breaches various provisions of the AD Agreement, the SCM Agreement, and GATT 1994. Each of the arguments is a variant on a common theme, and each arises from a common assumption. To quote Canada's response to a question from the Panel:

> The language of section 129(c)(1), by limiting compliance to future entries, has the effect of precluding the Department of Commerce from taking action to comply with the DSB ruling with respect to prior unliquidated entries. As Canada understands U.S. law, section 129(c)(1) would be interpreted this way because otherwise the express limitation to future entries contained in that section would be meaningless. The language of section 129(c)(1) precludes the Department of Commerce from applying the determination to prior unliquidated entries.
>
> Since Section 129(c)(1) directs the Department to apply a new WTOconsistent determination to all unliquidated entries entered on or after a particular date, section 129(c)(1) precludes the Department of Commerce from applying the new determination to unliquidated duties made prior to the particular date. That is, the use of the word "after" in section 129(c)(1) excludes any interpretation that would allow the Department of Commerce to apply the new determination to prior entries. Thus, by virtue of U.S. statutory interpretation and administrative law principles, the Department is precluded from applying the new determination to prior unliquidated entries.[11]

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[11] Canada's Responses to Questions, paras. 48, 49.

14. Canada's assumption, however, is not correct. Canada's error arises from a mistaken interpretation of the term "determination" as that term is used in section 129(c)(1). As the United States explains below, when the term is properly understood, it becomes clear that Canada's claims and arguments do not establish that section 129(c)(1) mandates WTO-inconsistent action.

15. Section 129(c)(1) states in its entirety:

> (c) Effects of Determinations; Notice of Implementation.—
>
> (1) Effects of determinations.—Determinations concerning title VII of the Tariff Act of 1930 that are implemented under this section shall apply with respect to unliquidated entries of the subject merchandise (as defined in section 771 of that Act) that are entered, or withdrawn from warehouse, for consumption on or after—
>
> (A) in the case of a determination by the Commission under subsection (a)(4), the date on which the Trade Representative directs the administering authority under subsection (a)(6) to revoke an order pursuant to that determination, and
>
> (B) in the case of a determination by the administering authority under subsection (b)(2), the date on which the Trade Representative directs the administering authority under subsection (b)(4) to implement that determination.

16. As the text demonstrates, the scope of section 129(c)(1) is actually quite limited. It only addresses the treatment of entries that take place on or after the date of implementation, and even then, it only addresses the application of the *particular determination issued under the authority of section 129(c)(1)* to those entries. It does not address what

actions Commerce may or may not take in a *separate* determination in a *separate* segment of the proceeding *(i.e.*, any separate review of the order), and thus does not mandate that Commerce take (or preclude Commerce from taking) any particular action in any separate segment of the proceeding.[12]

17. As the United States discussed in response to question 46 from the Panel, this point can be illustrated by considering the case of a challenge to a Commerce Department final dumping determination in an investigation. If the challenge were successful, Commerce would make the necessary changes in its methodologies and issue a new, WTO-consistent determination.[13] It would then apply that new

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[12] Section 351.102 of Commerce's regulations defines a segment of a proceeding as follows:

> (1) *In general.* An antidumping or countervailing duty proceeding consists of one or more *segments.* "Segment of a proceeding" or "segment of the proceeding" refers to a portion of the proceeding that is reviewable under section 516A of the Act.
>
> (2) *Examples.* An antidumping or countervailing duty investigation or a review of an order or suspended investigation, or a scope inquiry under § 351.225, each would constitute a segment of a proceeding.

[13] Section 129(c)(1) does not preclude USTR from directing implementation prior to the end of the reasonable period of time, and it does not preclude Commerce from implementing within the reasonable period of time. In both applications of section 129(c)(1) to date, USTR has directed implementation, and Commerce has implemented, before the end of the reasonable period of time. *See United States—Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea, Status Report by the United States*, WT/DS99/6, 17 January 2000, paras. 4, 8, 10 (explaining that USTR issued its request in the *DRAMS* case on August 2, 1999, that Commerce issued its new determination on November 4, 1999, and that the reasonable period of time expired on November 19, 1999) (Exhibit US-12); *see also* Exhibit US-9 (explaining that USTR issued its request in the *Stainless Steel* case on April 18, 2001 and that Commerce issued its new determination on August 28, 2001); *United States—Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and*

determination by setting a new cash deposit rate, which would apply to all entries that took place on or after the implementation date. It is this new determination that is the "determination" referenced in section 129(c)(1).

18. If a company were then to request an administrative review of what Canada terms "prior unliquidated entries," Commerce would conduct the administrative review and issue a new determination. Since the administrative review determination would not be the "determination implemented under section 129(c)(1)," nothing in section 129(c)(1) would preclude Commerce from applying its new, WTO-consistent methodologies in the administrative review.[14] Canada is simply wrong to claim that section 129(c)(1) would preclude Commerce from doing so.

19. The second scenario that Canada has raised is a situation where the WTO challenge results in the revocation of an antidumping or countervailing duty order because the new, WTOconsistent determination results in a finding of no injury, no dumping, or no subsidization. Under the terms of section 129(c)(1), the revocation would apply to all entries

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Strip from Korea, Agreement Under Article 21.3(b) of the DSU, WT/DS179/5, 1 May 2001 (explaining that the reasonable period of time in the *Stainless Steel* case expired on September 1, 2001) (Exhibit US-13).

[14] As Canada argued in the first Panel meeting:

> [t]he law applied [in an administrative review] is the law as interpreted by the Department of Commerce *at the time that it makes its administrative review decision. The Department of Commerce's interpretation may be quite different from the interpretation it originally applied in the original investigation or in previous administrative reviews.* Examples are instances in which a U.S. court has held that the Department of Commerce's interpretation of the law is incorrect or where the Department of Commerce has decided that a different interpretation of the law is more appropriate.

See Canada's Oral Statement at the first Panel meeting, para. 11 (emphasis added).

which took place on or after the date of revocation of the order, so Commerce would instruct the U.S. Customs Service to stop requiring cash deposits as of that date. In any subsequent administrative review, Commerce would need to decide what to do with respect to entries that took place prior to the date of revocation.

20. Canada has not challenged an actual application of section 129(c)(1) in such a scenario, and Commerce has not addressed such a scenario to date. The only impact of section 129(c)(1), however, is that Commerce would not determine the fate of those pre-implementation entries in *the revocation determination itself*. Section 129(c)(1) does not require Commerce to apply duties to those entries,[15] it does not limit Commerce's discretion in deciding how to administer the law in separate segments of the proceeding with respect to those entries, it does not limit judicial review of the results of those separate proceedings, and it does not limit Commerce's obligation to implement the results of any such judicial proceedings.[16] Accordingly, section 129(c)(1) does not mandate a breach of any of the provisions of the AD Agreement, the SCM Agreement, or GATT 1994 that Canada cites.

21. Since section 129(c)(1) does not mandate any particular treatment of what Canada terms "prior unliquidated entries" in any determination other than the particular one that is issued under its terms, section 129(c)(1) could *mandate* a breach of WTO rules only if the AD Agreement, the SCM

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[15] Even the SAA states only that the entries "would remain subject to potential duty liability." SAA at 1026.

[16] In response to the Panel's questions, Canada admitted that section 129(c)(1) would not violate WTO rules if Commerce "change[d] its interpretation of U.S. law for other reasons, notably as a result of a direction from a U.S. court." *See* Canada's Responses to Questions, para. 54. It also admitted that section 129(c)(1) "would not prevent a U.S. court from directing the Department of Commerce to change the basis on which it made definitive determinations . . . ." *See id.*, para. 51.

Agreement, or GATT 1994 contained an affirmative obligation for Members to ensure that any implementation of adverse DSB recommendations and rulings applied to both pre- and post-implementation entries. None of the Agreements contains such an obligation; none of the Agreements even addresses what constitutes proper implementation in WTO disputes. The only agreement that *does* address a Member's implementation obligations is the DSU, and Canada has declined to pursue any DSU claims. Under the DSU, a Member's implementation obligations are prospective only.[17]

III. Canada Has Established No Basis for its Efforts to Create Distinctions Between Members with Retrospective Duty Assessment Systems and Members with Prospective Duty Assessment Systems

22. In its first written submission, the United States demonstrated that, when a Member is implementing adverse DSB recommendations and rulings, the obligation of that Member is to bring its measure into compliance on a prospective basis.[18] Canada does not dispute this.[19] What is in dispute in this case is what it means to implement adverse DSB recommendations and rulings on a prospective basis when the measure in question is an antidumping or countervailing duty measure.

23. The United States has explained that prospective implementation of adverse DSB recommendations and rulings involving an antidumping or countervailing duty measure means that the border measure in question must be brought into compliance with the DSB recommendations and rulings

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[17] The United States discusses below why, contrary to Canada's repeated assertions, it is in fact seeking through this dispute to establish a right of retroactive relief in cases involving antidumping and countervailing measures.

[18] United States' first written submission, paras. 29-39.

[19] Canada's Oral Statement at the first Panel meeting, paras. 32-33.

and that all entries on or after the date of implementation must be treated consistently with the Member's WTO obligations.[20] In other words, prospective implementation is based on the date of entry.

24. Canada agrees that the date of entry is the relevant date for prospective implementation, provided that the Member in question has a prospective system of duty assessment.[21] In fact, Canada appears to agree that date of entry is an appropriate basis for considering prospective implementation for customs valuation issues as well.[22] Canada asserts, how-ever, that the same obligations undertaken by Members with prospective systems create different consequences for Mem-bers with retrospective systems[23] and that for Members with retrospective systems any determination made after the date of implementation must be consistent with the implementation, even if the determination involves pre-implementation entries.

25. Canada is the complainant in this dispute. As the complainant, Canada must make a *prima facie* case that the measure about which it complains constitutes a breach of WTO obligations. Making that *prima facie* case requires that Canada properly identify the measure about which it complains, and properly explain how that measure breaches the WTO obligations at issue. In this case, Canada has failed to identify how section 129(c)(1) breaches the United States' WTO obligations. As discussed above, Canada has failed to demonstrate that section 129(c)(1) mandates action inconsistent with Agreement obligations. As demonstrated herein, Canada also has failed to demonstrate either that retrospective

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[20] *See, e.g.*, United States' first written submission, paras. 40-48; United States' Oral Statement at the first Panel meeting, paras. 3-8.

[21] Canada's Oral Statement at the first Panel meeting, para. 38.

[22] *See* Canada's Responses to Questions, paras. 38-39.

[23] *Id.*, paras. 39-40.

and prospective systems are sufficiently distinct as to create the starkly different consequences Canada alleges or that there is a textual basis in the WTO Agreement for these distinct consequences.

26. In response to Question 2 from the Panel, Canada set forth its position that date of entry should be the basis for implementation in prospective systems. Therein, Canada claimed that after implementation:

> the Member [with a prospective system] is not required to apply a WTOconsistent determination to the calculation of any refunds due. Under this scenario, a Member with a prospective duty assessment system has assessed and collected the duty before the expiration of the reasonable period of time. The subsequent revocation or amendment of the order pursuant to which that duty was collected after the expiry of the reasonable period of time has no effect on the assessment and collection of that duty.[24]

While Canada might wish to create the impression that antidumping or countervailing duties collected at the time of entry under its prospective system are somehow "final" or "determinative," and are, thereby, different from retrospective systems, such an impression would be inconsistent with reality. Canada's own Memoranda describing its antidumping and countervailing duty system indicate that assessment does not occur until 30 days after entry,[25] that the duty is subject to

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[24] Canada's Responses to Questions, para. 5.

[25] Canadian Customs and Revenue Agency, Memorandum on Regulation D14-1-7, Assessment of Anti-Dumping and Countervailing Duties Under the Special Import Measures Act (May 15, 2000) para. 4 (Exhibit US-1); see also, Paper by Canada, G/ADP/AHG/W/30, 15 October 1997, at Topic 10, footnote **** (Exhibit US14)(wherein Canada indicated that pursuant to its prospective system, assessment of antidumping duties may occur up to 30 days after entry and that this assessment is "subject to redetermination or appeal.").

redetermination based on a request from the importer within 90 days of entry,[26] and that Canada may redetermine the normal value, export price or the amount of subsidy associated with any imported product within two years of the original determination.[27]

27. Canada is seeking to draw a line between reviews conducted pursuant to Article 9.3.1 of the AD Agreement (in retrospective systems) and reviews conducted pursuant to Article 9.3.2 of the AD Agreement (in prospective systems). In essence, Canada is arguing that Members with retrospective duty assessment systems have an obligation to apply adverse DSB recommendations and rulings when conducting Article 9.3.1 reviews of pre-implementation entries, while Members with prospective systems do not have an obligation to apply adverse DSB recommendations and rulings when conducting Article 9.3.2 reviews of pre-implementation entries.

28. As the complainant in this dispute, Canada has the burden of demonstrating the legal basis for its claim. That legal basis must be rooted in the text of the WTO provisions that Canada has cited. Instead, Canada is attempting to establish a different and higher level of obligation for Members with retrospective duty assessment systems than for Members with prospective duty assessment systems, based on nothing

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[26] Canadian Customs and Revenue Agency, *Memorandum on Regulation D14-1-3, Procedures for Making a Request for a Re-determination (An Appeal) of Goods Under the Special Import Measures Act* (December 15, 2000) para. 7 (Exhibit US-15).

[27] Canadian Customs and Revenue Agency, *Memorandum on Regulation D14-1-6, Liability and Payment of Provisional Duty, Anti-Dumping Duty, and Countervailing Duty Under the Special Import Measures Act* (May 16, 2000) para. 22 (Exhibit US-2); Canadian Customs and Revenue Agency, *Memorandum on Regulation D14-1-7, Assessment of Anti-Dumping and Countervailing Duties Under the Special Import Measures Act* (May 15, 2000) para. 5 (Exhibit US-1).

more than an arbitrary, form over substance, description of when duties are purportedly "final" under the two systems.

29. The inconsistency in Canada's claims is further evidenced in Canada's position with respect to judicial review. In response to question 63 from the Panel, Canada stated:

> The date of the definitive duty assessment is the date the Department of Commerce, following judicial review, makes its final determination consistent with the decision of the reviewing court. [. . .] Assuming liquidation is enjoined pending the results of judicial review, the Department of Commerce determination does not take effect unless and until affirmed by the court. In the event the court disagrees with the Department of Commerce determination under review the court will remand the issue to the Department of Commerce to make its definitive determination not inconsistent with the court's decision.[28]

Canada's statement appears to imply that for Members with retrospective systems, an administrative determination subject to judicial review is not final until the completion of that judicial review. Canada suggested as much at the first Panel meeting, when its representative appeared to claim that an administrative determination made under a retrospective system would need to comply with adverse DSB recommendations and rulings if judicial review of that determination is not completed until after the implementation date. But Canada's determinations under its prospective system are also subject to judicial review. Canada has not explained how the same terms regarding judicial review in Article 13 of the AD Agreement and Article 23 of the SCM Agreement can be read to create such disparate results between Members with retrospective duty assessment systems and Members with prospective duty assessment systems.

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[28] Canada's Responses to Questions, para. 83 (emphasis added).

30. Canada attempts to build its legal arguments around the concept of "finality;"[29] however, Canada employs inconsistent definitions of finality in order to create artificial distinctions between retrospective and prospective systems. The reality is that under either system, merchandise enters the customs territory of the Member and the importer transfers a sum of money to the Member because of the antidumping or countervailing measure in place. That sum might be called a definitive duty or it might be called a cash deposit. In either case, it may or may not be the final word on the amount to be paid because of the dumping or subsidization. In either case, a review may be requested and the importer may get money back. In either case, that review may be subjected to judicial review.

31. When Canada's labels are set aside, the similarities between the two duty assessment systems are striking and in both cases, the liability for antidumping or countervailing duties arises at the border, at the time of entry. Canada argues that a Member's WTO obligations are driven not by the text of the Agreements, but by the manner in which a Member establishes its domestic law, and that a Member can change its WTO obligations by arbitrarily designating an action as "final." Canada's claims seek to elevate the words used in domestic legislation over the substance of the obligations undertaken by Members, despite the fact that Canada has previously recognized that the AD Agreement, at least, does not provide detailed rules regarding how retrospective and

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[29] *See* Canada's Responses to Questions, paras. 38-39 (seeking to introduce the concept of "finality" in response to the Panel's hypothetical facts in Question 17 and thereby basing whether a Member must treat an entry consistent with DSB recommendations and rulings on whether a domestic court, applying domestic legal principles, finds the initial action consistent with domestic law).

prospective duty assessment systems are to be applied.[30] Canada's claims are without foundation in the Agreements, would elevate form over substance, and create rights and obligations not provided for in the Agreements. By contrast, recognizing the date of entry as the controlling date for implementation avoids creating these differences that are not contemplated in the Agreements.

IV. Canada's Answers to the Panel's Questions Confirm That Canada Is Seeking a Retroactive Remedy in Cases Involving Antidumping and Countervailing Duty Measures

32. The United States has argued throughout this case that the DSU provides for prospective remedies in dispute settlement cases, and that there is no basis in the text of the DSU for requiring WTO Members to provide retroactive relief when their measures are found to be inconsistent with WTO rules.[31] Canada has claimed to support this concept.[32] Its answers to the Panel's questions, however, have conclusively demonstrated that Canada *is* in fact seeking to establish an obligation for Members with retrospective systems to provide retroactive remedies in cases involving antidumping and countervailing duty measures.

33. Canada clearly establishes this point in response to question 32 from the Panel. The question asked whether Canada was arguing that the United States was obliged to refund cash deposits collected on what Canada terms "prior unliquidated entries." Canada replied that the United States would in fact be required to return such cash deposits.[33] Thus,

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[30] *Paper by Canada*, G/ADP/AHG/W/30, 15 October 1997, at Topic 10, Part I (Prospective and Retrospective Duty Assessment) (Exhibit US-14).

[31] *See, e.g.*, United States' first written submission, para. 2.

[32] *See, e.g.*, Canada's Oral Statement at First Panel Meeting, paras. 32-33.

[33] *See* Canada's Responses to Questions, para. 67.

Canada believes that Members with retrospective systems are not only under an obligation to ensure that all future (post-implementation) actions conform to WTO rules; they are also under an obligation to undo *past* (pre-implementation) actions.

34. The United States appreciates Canada's candor, since it crystallizes for the Panel what this case is actually about. The United States fails, however, to see the legal basis for Canada's assertion. Canada has argued repeatedly during this dispute that its arguments do not amount to a claim for retroactive relief because it is only asking the United States to make its decisions *after* the implementation date in accordance with adverse DSB recommendations and rulings, even if those decisions relate to pre-implementation entries. And it has sought to distinguish the obligations applying to Members with prospective systems by claiming that those Members assess and collect duties at the time of entry, so that there are no decisions "after" the reasonable period of time that need to be made. In Canada's view, a Member would only violate WTO rules if were to make a WTO-inconsistent decision after the reasonable period of time.

35. When a Member with a retrospective system collects cash deposits, however, it does so pursuant to a determination made *prior to the date of entry* that the conditions for requiring such deposits were met. In this sense, the situation of the Member with a retrospective system is identical to the situation of the Member with a prospective system.

36. In addition, under the logic that Canada has applied to prospective systems, if a Member with a retrospective system took *no* action with respect to cash deposits after the implementation date, there would be no possibility of a WTO breach. Canada has failed even to attempt to explain how its asserted obligation not to take WTO-inconsistent action after the implementation date can somehow be transformed into an affirmative obligation to *take* a certain action—namely,

refunding cash deposits collected before the implementation date—when that "obligation" appears nowhere in the AD Agreement, the SCM Agreement, GATT 1994, or the DSU.

37. Finally, the United States notes one additional point on the subject of retroactive remedies. The United States has argued repeatedly that the scope of a Member's implementation obligations is governed by the situation in effect at the time of entry. As the United States noted at the first Panel meeting, however, if Canada is correct in arguing that the critical issue is the legal situation in effect when a Member determines final duty liability, then a Member that has received DSB authorization to suspend concessions may do so with respect to unliquidated, pre-authorization entries. Canada's attempt to distinguish the *Customs Bonding* case on the basis of when the "rate of duty is fixed" misses the point,[34] since its argument implies that a Member that "fixes" the rate of duty at some point after the date of entry could, in fact, suspend concessions on unliquidated, pre-authorization entries.

V. Conclusion

38. For the foregoing reasons, and for the reasons set out in previous submissions, the United States respectfully requests the Panel to find that Canada has failed to establish that section 129(c)(1) breaches any of the provisions that Canada cited in its request for a panel. Canada's arguments to the contrary are without a legal basis and the Panel should reject them.

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[34] *See* Canada's Responses to Panel Questions, para. 80.

TABLE OF EXHIBITS

U.S. Exhibit	*Description*
11	*Restatement (Third) of the Foreign Relations Law of the United States*, §114 (1986)
12	*United States—Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea, Status Report by the United States*, WT/DS99/6, 17 January 2000
13	*United States—Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea, Agreement Under Article 21.3(b) of the DSU*, WT/DS179/5, 1 May 2001
14	*Paper by Canada*, G/ADP/AHG/W/30, 15 October 1997
15	Canadian Customs and Revenue Agency, *Memorandum on Regulation D14-1-3, Procedures for Making a Request for a Redetermination (An Appeal) of Goods Under the Special Import Measures Act* (December 15, 2000)